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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1878

PHILIP ZANE and JEROME E. SILVERMAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners Philip Zane and Jerome E. Silverman pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 1, 1974.

Opinion Below

The opinion of the Court of Appeals, which is unreported, is reprinted as Appendix A, annexed hereto. No opinion was rendered by the United States District Court, Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals was entered on April 1, 1974. A timely petition for rehearing, with a suggestion for hearing *en banc*, was denied on May 15, 1974 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Court of Appeals rejected standards of *res judicata* previously established by this Court and guaranteed by the constitutional proscription against double jeopardy contained in the Fifth Amendment to the United States Constitution by approving petitioners' convictions of a substantive offense where the jury previously returned verdicts of acquittal against petitioners on a charge of conspiracy to commit that substantive offense and on numerous other charges which contained the material factual allegations of the substantive offense.

2. Whether the Court of Appeals, in reviewing petitioners' convictions, may apply a standard of appellate review which assumes petitioners' guilt of offenses of which they were specifically acquitted by a jury.

3. Whether the "co-conspirators exception" to the hearsay rule permits the introduction of hearsay testimony against petitioners on a substantive offense charged against them where the jury has previously acquitted petitioners of the conspiracy offense.

4. Whether petitioners were deprived of their right of confrontation as guaranteed by the Sixth Amendment to the United States Constitution where the trial Court

prohibited them from conducting any cross-examination of a key rebuttal witness called by the Government.

5. Whether petitioners were denied their right of confrontation by the trial Court's limitations on their right to cross-examine a key Government witness.

6. Whether the Court of Appeals has sanctioned identification procedures which violate the standards established by this Court and guaranteed by the due process clause of the Fifth Amendment to the United States Constitution by approving the trial Court's denial of petitioners' application that a pre-trial confrontation under non-suggestive circumstances be arranged before a key Government witness be permitted to identify petitioners in the courtroom.

Statutory Provisions Involved

Title 15, United States Code, §78o

Title 15, United States Code, §78ff

Title 18, United States Code, §2

Title 18, United States Code, §371

Title 18, United States Code, §1505

Title 18, United States Code, §1621

17 C.F.R. §240.15d-1

17 C.F.R. §240.12b-20

(The above provisions are set forth in Appendix C annexed hereto).

Statement of Proceedings in the United States District Court for the Southern District of New York

Petitioners Philip Zane and Jerome E. Silverman were charged by indictment in the United States District Court for the Southern District of New York, with others, as follows:

> Count 1 charged a conspiracy among Zane, Silverman, and others to knowingly and wilfully file with the Securities and Exchange Commission (hereinafter "SEC") a false and misleading Form 10-K annual report for Microthermal Applications, Inc. (hereafter "Microthermal") for the fiscal year ending January 31, 1970 (18 U.S.C. §371).
>
> Count 2 charged Zane, Silverman, and others with the substantive offense of knowingly and wilfully filing (and aiding and abetting the filing of) the false and misleading Form 10-K referred to in Count 1 (15 U.S.C. §78o; §78ff; 17 C.F.R. §§240.15d-1, 240.12b-20; 18 U.S.C. §2).
>
> Count 3 charged Zane and Silverman with obstruction of justice by the submission to the SEC of "fraudulently" prepared documents allegedly designed to "cover up" the receipt by Zane and Silverman of an alleged bribe which they had allegedly received to induce their participation in the offenses charged in Counts 1 and 2 (18 U.S.C. §§ 1505, 2).
>
> Counts 4 and 5, asserted against other defendants were severed before trial.
>
> Counts 6-12 charged Zane with perjury for testimony given before the SEC in connection with an

SEC investigation into the matters specified in Counts 1-3 (18 U.S.C. §1621) (the seven perjury counts are discussed individually *infra*, pp. 7-8).

Trial of the action against Zane and Silverman (and against a co-defendant, Robert Persky*) commenced on May 7, 1973 before the Hon. Inzer B. Wyatt and a jury. On June 11, the jury commenced deliberations. On June 12, at approximately 5:30 p.m., the jury returned a partial verdict, acquitting Zane and Silverman on Counts 1 and 3, and acquitting Zane on Counts 6, 7, 9, 10, and 11. The following morning, the trial Court read the *Allen* charge to the jury and delivered other supplemental instructions in response to several jury notes. Over three hours later, the jury returned a second partial verdict in which they found Zane and Silverman guilty on Count 2, and reported themselves unable to agree as to Counts 8 and 12 against Zane.

On September 6, 1973, petitioners were sentenced to two-year terms, with four months to be served in the custody of the Attorney General and two years probation.

Statement of Facts

1. The Indictment

The conspiracy count (Count 1) provided the background for every count charged against petitioners. In substance, Count 1 charged that in July, 1969, Microthermal raised approximately $800,000. from a public of-

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* Co-defendants Fisher, D'Onofrio and United States Secretarial Institute, Ltd. were severed. Co-defendant Kaplan pleaded guilty to one count.

fering of its common stock, of which approximately $650,000. was required (according to the Microthermal prospectus for the public offering) to be invested in interest-bearing obligations such as certificates of deposit or Government securities. It further charged that by January, 1970, Morton Kaplan, the president of Microthermal, had caused $480,000 of Microthermal's funds raised by the public offering to be transferred to John P. Galanis and Akiyoshi Yamada, the general partners of a hedge fund doing business as Takara Partners, in violation of the "use of proceeds" section of the prospectus, and that, in order to conceal this misuse of proceeds, Robert Persky (a shareholder and secretary of, and a partner in the law firm acting as general counsel to, Microthermal), in concert with Galanis, Yamada, and Kaplan, "drew up papers disguising the transaction" as one which satisfied the use of proceeds section.

Microthermal was required to file with the SEC a Form 10-K annual report for the fiscal year ending January 31, 1970. The indictment charged that in April, 1970, Kaplan and Persky discharged the accounting firm of Arthur Andersen & Company, which had been the accounting firm used by Microthermal, and hired petitioners Zane and Silverman, principals in a two-man accounting partnership. The indictment charged that in May, 1970, at a meeting in Persky's office allegedly attended by numerous co-conspirators, Galanis promised Zane and Silverman a $5,000 bribe "and other inducements" to certify the financial statement made a part of Microthermal's Form 10-K, which stated that Microthermal's assets included certificates of deposit representing the amount of funds previously loaned to Galanis and Yamada. It was alleged that Zane and Silverman accepted this bribe, and that they knowingly and wilfully certified the false financial statement in exchange for the alleged $5,000 bribe paid to them by Galanis in June, 1970.

Count 2 incorporated by reference the essential factual allegations of the conspiracy count, and charged petitioners (and others) with the substantive offense of wilfully and knowing submitting to the SEC (and the aiding and abetting thereof) of Microthermal's Form 10-K.

Count 3, asserted only against Zane and Silverman, alleged that in April, 1971, after they received a subpoena from the SEC requiring production of documents relating directly or indirectly to Galanis and others, Zane and Silverman met with Galanis "to discuss how to cover up the fact that they had received $5,000 in additional unlawful compensation in connection with the preparation and filing of financial statements for Microthermal, as described in . . . Count One"; Count 3 charged that such fraudulent documents were in fact prepared and submitted to the SEC in an alleged attempt to "cover up" the alleged $5,000 bribe from Galanis, and that such constituted an obstruction of justice.

Counts 6-12 charged Zane with perjury in connection with testimony Zane had given to the SEC with reference to the matters charged in Counts 1-3. In summary, these counts charged that Zane testified falsely when he testified as follows:

> Count 6: No one other than Persky, Silverman, Kaplan [Microthermal's president], Zane, and perhaps Galanis, were present at meetings in Persky's office, and Yamada was never present.
>
> Count 7: The only compensation Zane or the firm of Zane & Silverman ever received from Galanis was for services under a bill dated June 10, 1970.
>
> Count 8: Zane and Silverman had no reason to believe that the certificate of deposit referred to in

a June 10, 1970 letter addressed to Silverman by an officer of the Franklin National Bank did not exist as of January 31, 1970.

Count 9: No person associated with the firm of Arnold Wilkens was ever involved in any meetings which Zane had with anyone pertaining to the audit of Microthermal or the CDs.

Count 10: Zane and Silverman received $5,000 from Galanis, pursuant to a bill dated June 10, 1970, for services rendered to Galanis prior to that date in connection with the analysis of documents for and conferences with Galanis with a view to determining the profitability of running different businesses in which Galanis personally was interested.

Count 11: The $5,000 petitioners received from Galanis did not have anything to do with petitioners' audit of the books of Microthermal.

Count 12: Up to the time Zane and Silverman issued their auditors' report for Microthermal, no facts had come to their attention to indicate that the CDs were not in existence.

As previously noted, the jury acquitted Zane and Silverman on Count 1, acquitted Zane and Silverman on Count 3, and acquitted Zane on Counts 6, 7, 9, 10, and 11. The day after petitioners' acquittals on all these counts, after having deliberated for an additional three hours, the jury returned a verdict of guilty against both petitioners on Count 2 (and declared itself unable to agree on Counts 8 and 12 against petitioner Zane). It is from petitioners' conviction on Count 2 that this appeal has been taken.

2. The Government's main witnesses and their bargains

The Government's main witnesses were Galanis and Yamada (the general partners of Takara Partners), and Steven Burns (who had recommended Zane and Silverman to Galanis). These three were the only witnesses who testified on the basis of alleged first-hand knowledge that Zane and Silverman allegedly knew, at the time the Form 10-K was filed, that the CDs in question did not exist. Undisputed evidence showed that each of the three had an overwhelming motive to "cooperate" with the Government by offering testimony, whether or not accurate, against others.

John Galanis sought to make a deal with the Government when he learned that the SEC was investigating accusations others had made against him in connection with an overwhelming number of widespread and substantial securities manipulations. He admitted at trial to having committed over a dozen separate and distinct criminal securities frauds involving the defrauding of investors of many millions of dollars. Galanis' crimes generally followed the pattern of manipulating the market in a given stock to artificially high prices, disseminating false information to present and prospective stockholders, and disposing of the stock by bribing employees of large institutional buyers. Galanis had also committed various tax crimes, and miscellaneous various other crimes such as forgery. Galanis' deal with the Government, in brief, was as follows:

Three indictments arising out of three separate securities frauds were returned against Galanis; the Government agreed not to bring any other charges against him with respect to all others of his criminal activities—which had been outlined in a massive 134-page civil complaint

brought against him (and others) by the SEC in the United States District Court for the Southern District of New York (71 Civil Action No. 4932). One of the three indictments was dropped; Galanis pled guilty to one count in each of the two remaining indictments (with over a dozen other counts in those indictments being dismissed), which were consolidated for sentencing before a single judge. Government attorneys brought his "cooperation" to the attention of the sentencing judge, and Galanis was ultimately sentenced to a total of six months imprisonment, without any fine, and a period of probation. Moreover, the Government agreed to assist Galanis in fighting extradition to Canada, where he had been formally charged with a multi-million dollar securities fraud; that Canadian charge was still pending at the time Galanis testified, and he was a fugitive from the Canadian authorities at the time he testified in this case (T. 217,* 225-232, 416-428, 430-433, 437-456, 484-493, 841).

In addition to his deal limiting his criminal exposure, Galanis was equally successful in the civil tax aspects of his many frauds. For the calendar year 1970, in which Galanis had submitted a personal income tax return reporting gross receipts of over $3,875,000 and a net profit of only $252,000, and in which Galanis had refused to divulge whether he owned or controlled any foreign bank accounts—a return which Galanis accompanied with a letter advising the Internal Revenue Service that the return was based on incomplete information which would require revision—Galanis, after making his deal with the Government, received a letter from the Internal Revenue Service advising him that there would be no change (T. 498-504; Z/SA** 151-155).

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* The letter "T" followed by a number designates page reference to the trial transcript.

** The designation "Z/SA" followed by a number indicates page reference to Petitioners' Appendix.

Akiyoshi Yamada had participated with Galanis in most of the securities manipulations referred to above. Although the trial Court would not permit defense counsel to develop on cross-examination what the Court characterized as the "litany" of Yamada's many offenses, Yamada did admit to the commission of over a dozen separate and distinct securities frauds and acknowledged that at the time he decided to make his deal with the Government, he faced the possibility of life imprisonment plus substantial fines for his many crimes. In addition, he had committed perjury for four and one-half consecutive days before the SEC. Yamada agreed to plead guilty to three one-count informations before a single judge, with the Government's commitment that he would not be prosecuted for any other offenses. He had not yet been sentenced at the time he testified, although he had learned of the sentence given to Galanis, and the Government had agreed, as in Galanis' case, to call to the attention of the sentencing judge Yamada's "cooperation" with the Government.* Moreover the Government had agreed to dismiss various other multi-count indictments then pending against Yamada. In addition, Yamada had not yet filed income tax returns for 1970, 1971, and 1972 (T. 1574-1589, 1594-1596, 1599-1606, 1676-1680).

Steven Burns was a three-time loser. In a 1968 indictment, he had been convicted of stock manipulation in

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* Subsequent to petitioners' trial, Yamada was sentenced, and then filed a motion for reduction of his sentence. In support of his motion, Yamada submitted forged and fraudulent letters of commendation from alleged third parties to the sentencing judge. He pleaded guilty to six felony counts contained in an indictment filed against him in connection with these forged letters. Petitioners moved for a new trial based upon these events, but the motion was denied by the District Court. A notice of appeal from this latter ruling has been filed and is presently pending in the Circuit Court.

which he had accepted bribe money. While his conviction was on appeal, Burns was committing additional violations for which he was subsequently convicted of obstruction of justice—by destroying records in order to thwart an SEC investigation (unrelated to Microthermal). When he pleaded guilty to one count with respect to his involvement with Microthermal, the Government again called Burns' "cooperation" to the attention of the sentencing judge and asked for leniency for Burns, and Burns received a sentence to run concurrent with his obstruction of justice sentence. Moreover, Burns too had committed numerous other offenses as to which the Government agreed not to prosecute him (T. 1804-1809, 1861-1878, 1907-1908, 1956-1957, 1979).

3. The Government's evidence

Galanis and Yamada testified as follows:* in the fall of 1969, after having been associated as an executive with the Neuwirth Fund, Galanis joined Yamada as the two general partners in a hedge fund doing business as Takara Partners. The limited partners of Takara Partners, most of whom had invested a minimum of $100,000, included sophisticated investors such as the former head of the New York Stock Exchange, the president of the Rockefeller Brothers Foundation, and many other men of wealth and apparent substance (T. 218-224, 515, 1488-1491).

In the fall of 1969 Yamada introduced Galanis to Morton Kaplan, the president of Microthermal, which had just netted over a half a million dollars from a public offer-

* Galanis and Yamada had spoken on several occasions with various Government attorneys before trial. At trial, their testimony varied significantly in numerous substantial respects from their previous statements (see, *e.g.*, T. 540-544, 581-582, 587-590, 593-594, 594-595, 596, 597, 602-603, 605, 613-615, 618-620, 925 and 964, 986, 1617, 1619, 1623).

ing. Pursuant to the "use of proceeds" section in the prospectus for the public offering, the money raised from the offering was required to be invested in CDs, Government securities, or other interest-bearing obligations. Kaplan was interested in whatever assistance Galanis and Yamada could render in manipulating the price of the stock in several other companies (other than Microthermal) which Kaplan controlled. At the same time, Galanis and Yamada were in an illiquid financial situation (T. 234-237, 1493-1501).

Galanis, Yamada, and Kaplan satisfied their respective needs. By January, 1970, Kaplan had caused the transfer to Takara Partners of $480,000 from the moneys received through the public offering. Galanis and Yamada testified that although the money was strictly a loan, various documents were allegedly drawn up by Persky, a stockholder in Microthermal and a partner in the law firm that was its general counsel, in an effort to disguise the true nature of the loan into a form of transaction that would purport to satsify the "use of proceeds" section of the Microthermal prospectus.

By late February 1970, the false documentation had been completed, and all of the $480,000 had been completely dissipated by Galanis and Yamada. It was undisputed that none of these participants knew, or had heard of, or had met, petitioners Zane and Silverman. The accountants for Microthermal at the time were the Miami office of Arthur Andersen & Company (T. 278-280, 245, 251, 255-256, 275, 295).

In late February 1970, Galanis, Kaplan, and Persky discussed, in connection with Microthermal's requirement to file with the SEC an annual Form 10-K, the need, in Galanis' words, "to create the proper documentation for the transactions that had been accomplished. . . . [W]e

had to recast the moneys as being involved in certificates of deposit." (T. 287-289). Discussions of the need to camouflage the $480,000 that had been transferred to Takara Partners as having been invested in CDs continued through March (T. 293). Galanis testified:

> "Q. Was the topic of discussion, among others, the need to fool accountants by falsifying books and records and possibly submitting phony documents?
>
> A. Most certainly." (T. 551-552)

Indeed, Galanis and Yamada admitted to having previously attempted and succeeded in duping other accountants, the last being as late as the period around April, May, and June of 1970 (the same time-period as their dealings with Zane and Silverman), when they fooled the accounting firm of Laventhol, Krekstein, Horwath & Horwath into certifying a false financial statement for Takara Partners reflecting net assets of approximately $3,300,000 when in fact Takara Partners at the time was in a badly illiquid position (T. 454-458, 559, 1613-1615). In that connection, Galanis and Yamada concealed from Laventhol, Krekstein the true nature of the transfer of the $480,000 from Microthermal to Takara Partners (T. 964, 1616). In addition, Galanis admitted mailing to Arthur Andersen & Company in June 1970, a letter confirming the existence of CDs which Takara Partners allegedly held for another of Kaplan's companies, which was false (T. 557).

Galanis and Yamada testified, over objection, that Kaplan had told them around March 1970, that Arthur Andersen & Company was beginning to ask "embarrassing" questions about the transfer of funds from Microthermal to Takara Partners, and that Kaplan, Galanis, and Yamada feared Arthur Andersen's "strictness" in conducting the

audit, and that they th refore felt that a more "liberal" accounting firm was needed (T. 296-299, 1553).

Galanis testified that in order to find "liberal" accountants he called Joseph Rozzo, a friend who worked in a brokerage firm; that Rozzo informed Galanis he would contact an associate named Steven Burns; and that Burns, in late March, called Galanis and recommended petitioner Silverman (who had just formed a partnership with petitioner Zane (T. 298-303)). Burns, at the time he contacted Silverman, was unaware of Microthermal's financial problem and had no knowledge of any impropriety in connection with the matter with respect to which he had contacted Silverman, but was simply trying to help Silverman, in Burns' words, "get his foot in the door with a major client"; indeed, Burns gave Silverman a "glowing picture" of Galanis (T. 1815, 1880).

Galanis testified that he met with either Silverman or Zane on four different occasions (T. 529).

The first meeting, according to Galanis, occurred in early April 1970, at Persky's office. Allegedly present were Galanis, Silverman, Kaplan, and Persky (Galanis initially testified that petitioner Zane was also present at this alleged meeting but later retracted the allegation). Galanis testified at this meeting he attempted to impress Silverman with his (Galanis') stature in the financial community. No mention was made to Silverman of Microthermal's loan to Takara Partners; Galanis only mentioned that CDs were being held for Microthermal by Takara. For that reason, Galanis admitted that no discussion occurred with respect to any possible bribe of the accountants to induce their certification (T. 305-307, 331, 530, 535).

After that meeting, Kaplan and Galanis agreed "that we would have to start getting busy and give them [Zane and Silverman] some sort of documentation that would

be necessary in order to prove the CDs' existence." (T. 309). Kaplan suggested to Galanis that they borrow a bearer certificate of deposit to present physically to Zane and Silverman. Galanis attempted to obtain one from Richard Kirschbaum, a man "active in the money markets", but was unsuccessful (T. 312-314).

Galanis' second meeting with Silverman, and first meeting with Zane, allegedly occurred in the first week in May. Galanis allegedly met with Yamada, Zane, Silverman, and Persky at Persky's office. Galanis testified that at this meeting Zane and Siverman stated that they could certify Microthermal's financial statement if they received an adequate letter from a bank confirming the existence of the CDs (T. 310, 317-319, 332-335).

Immediately thereafter, Galanis set in motion machinery which resulted in the issuance by the Franklin National Bank of a letter confirming the existence of a bearer $500,000 CD purportedly delivered by the Franklin National Bank to the Bank of New York for the account of Microthermal, a letter which was false, which was not known by the Franklin National Bank or any of its officials to be false, and which was submitted to Zane and Silverman in connection with their certification of the financial statement made part of Microthermal's Form 10-K. It was undisputed that neither Zane nor Silverman had any knowledge of and did not participate in any manner in the scheme, which took place as follows.

After the alleged meeting with Zane, Silverman, Persky, and Yamada, Galanis called Kirschbaum.

> "I asked Mr. Kirschbaum if he still had the ability to acquire a letter from a bank stating that a certificate of deposit existed for the account of Microthermal Applications. He said he felt he did." (T. 338)

Kirschbaum said it would cost $3,500 to bribe a bank official, and Galanis agreed to the price. He supplied Kirschbaum with the name and address of Kaplan and Microthermal, and told Kirschbaum the amount of the alleged CD was to be $500,000 (T. 338-341).

On May 13, 1970, Frank Woodruff, an assistant investment officer at the Franklin National Bank, received a telephone call from a man who claimed to represent Microthermal and who identified himself as Persky, requesting the delivery by the Franklin National Bank to the Bank of New York of a $500,000 bearer CD. Woodruff was asked to send a confirmation to Morton Kaplan in Miami, c/o Microthermal. Woodruff, without contacting the Bank of New York, instructed the certificate of deposit department at the Franklin National Bank to deliver the requested CD to the Bank of New York against payment (T. 1169-1188).

A simultaneous transaction was similarly undertaken by co-conspirators operating through the Bank of New York. Charles Fischer, a money-lender who was indicted in this matter but whose case was severed on the day trial commenced, received a call from Kirschbaum asking Fischer to produce evidence "where a corporation could show that it could move money without actually having money" (T. 908). Fischer in turn called Mort Shor, an executive vice-president at the Neuwirth Fund. Shor was a friend of Galanis and, at the Neuwirth Fund, was entrusted with discretion on the placement of short-term investments for the Neuwirth Fund. The Bank of New York was the Neuwirth Fund's custodian bank. Shor called the Neuwirth Fund's trust administrator at the Bank of New York, Gilbert Losurdo, and instructed him to accept for the account of the Neuwirth Fund a $500,000 bearer CD to be delivered by the Franklin National Bank. (T. 998, 1020, 1297-1305, 1387-1390).

Thus, Franklin National Bank had been instructed to send to the Bank of New York a $500,000 bearer CD for the account of Microthermal, and the Bank of New York had been instructed to receive from the Franklin National Bank a $500,000 bearer CD for the account of the Neuwirth Fund. When the CD arrived at the Bank of New York on May 14, the Bank of New York wired $500,000 to the Federal Reserve System for the account of the Franklin National Bank. Neither bank communicated with the other because the transaction at each bank appeared regular: the Bank of New York received a $500,000 bearer CD and wired funds for the Franklin National Bank, which in turn received adequate funds to cover its issuance of the $500,000 bearer CD. Thus, as of May 14, 1970 Frank Woodruff, assistant investment advisor at the Franklin National Bank, believed that the Franklin National Bank had delivered to the Bank of New York on May 14, 1970, a $500,000 bearer CD for the account of Microthermal or Morton Kaplan (T. 1185, 1217-1223, 1292-1293, 1418-1420).

On May 14, 1970, as per the telephone instructions given to him the day before, Woodruff sent to Kaplan a confirmation of the transaction as that transaction was then understood by Woodruff. On May 18, Kaplan's bookkeeper, Kathleen Plott, sent to Zane and Silverman a copy of Woodruff's confirmation letter of May 14. This letter was unacceptable to Zane and Silverman because it was a copy, the original had not been mailed directly to them by the Bank, and it was ambiguous whether the CD had been delivered for the account of Microthermal or for the account of Kaplan personally (Z/SA 147; T. 2201, 2274, 2673-2676).

As a result of Zane and Silverman's refusal to certify based on the May 14 letter from the Franklin National

Bank, Galanis testified that he called a meeting in late May or early June at Persky's office (T. 349-350). Galanis testified that before the meeting he called Burns, who allegedly had a strong "influence" on Zane and Silverman. The occurrence of this meeting was sharply disputed by petitioners (and by Persky). Galanis, Yamada, and Burns testified that it occurred.

According to the testimony of Galanis, Yamada, and Burns, the meeting, which lasted for several hours, was attended by Galanis, Yamada, Burns, Kaplan, Persky, Zane, Silverman, and, for a time, Joe Rozzo (this meeting will hereinafter be referred to as the "Rozzo meeting," as Rozzo's temporary presence was the link through which it was clear that Galanis, Yamada, and Burns were each testifying about the same alleged meeting).

Galanis testified that at the Rozzo meeting he informed Burns for the first time that the "CD" did not exist, and asked Burns to use his "influence" with Zane and Silverman. Burns testified that he then took Zane and Silverman aside, and assured them that they would have adequate evidence of Microthermal's ownership of the CD before the certification was required to be filed and that they should proceed with their preparation of the financial statement. Burns testified that when Zane and Silverman resisted, he telephoned Rozzo to come to the meeting to try to persuade Zane and Silverman to cooperate. Burns further testified that he suggested to Zane and Silverman and they accepted a promise of a $5,000 payoff from Galanis to continue the performance of the accounting work, plus a commitment from Galanis to retain Zane and Silverman for future accounting work for which they would later receive $15,000 to $20,000, and that Zane and Silverman agreed to the bribe (T. 351-360, 1820, 1823-1836, 1855-1859, 1887).

As previously noted, petitioners Zane and Silverman denied that they were present at any such meeting. Joe Rozzo, who was also allegedly present at the meeting for a time, was called as a Government witness. He testified that at about this date he received a call from Burns to attend a meeting at Persky's office, and most of the participants named at trial by Galanis, Yamada, and Burns were present. However, he testified that Zane and Silverman were not present, and that he did not even hear their names mentioned at the meeting (T. 1990-1993, 2864-2866, 2932, 2943).

Thereafter, two letters of confirmation, each dated June 10, 1970, were prepared and signed by Woodruff of the Franklin National Bank (Z/SA 148, 149). The first was prepared and signed at the telephone request of a man identifying himself as "Persky". On June 10 a man identifying himself as "Persky" arrived at the bank to pick up the letter and observed that it repeated the error of the May 14 confirmation, i.e., it stated that the CD had been delivered to the Bank of New York for the account of Kaplan rather than Microthermal. At this individual's request, Woodruff prepared and signed a second letter dated June 10 which stated that the CD had been delivered for the account of Microthermal. Woodruff believed the contents of these letters when he signed them. This second June 10 letter was sent to Zane and Silverman (T. 1198-1203, 1211-1212, 1224, 2678).

The only testimony that Zane and Silverman ever saw the first June 10 letter was rebuttal testimony offered by the Government through Lester Green, an attorney for the SEC, who testified that Persky had told him, in a pre-indictment conference, that Zane and Silverman had seen this letter (the trial Court refused to permit counsel for Zane and Silverman to cross-examine Green with

respect to this testimony; see *infra*, pp. 38-41). Zane and Silverman both denied ever having seen or heard of the first June 10 letter before trial (T. 2678-2679, 2930-2931).

Testimony with respect to the bank transactions was presented through Fischer, Shor, Woodruff, and Losurdo, all of whom testified that they never met Zane or Silverman, and that Zane and Silverman had nothing to do with the bank transactions (T. 969, 1065-1066, 1210, 1324, 1417).

Galanis testified that in June 1970, he visited Zane and Silverman at their office and gave them a $5,000 check as a bribe "to induce them to certify the statement of Microthermal" (T. 384). With respect to the alleged $15,000 to $20,000 in additional accounting work that he had allegedly promised them, Galanis admitted that he never gave it to them and that they never asked him for it (T. 1617-1618).

Galanis testified that in the spring of 1971, after the SEC had begun its investigation of his various securities frauds, he received a call from and spoke over the telephone with Zane and Silverman, who had received an SEC subpoena to produce documents relating to Microthermal, Galanis, Yamada, and others. Galanis made an appointment to meet Zane at Galanis' office.

Galanis testified that Zane asked him to provide false documentation to justify the alleged $5,000 bribe. Galanis testified that he gave Zane no documentation, but that he signed a letter pre-dated September 24, 1970, which purported to be a letter from Galanis to Silverman requesting the return of documents which Galanis testified had never been given to Zane and Silverman. Galanis denied ever having seen a bill from Zane & Silverman for $5,000 for accounting services relating to various of Galanis' oth-

er business interests, or a letter dated October 3, 1970, which purported to be a cover letter from Zane and Silverman returning documents to Galanis with respect to those other Galanis business interests (T. 398-416).

The submission by Zane and Silverman to the SEC of those three documents—the pre-dated September 24, 1970 letter of request from Galanis, the October 3, 1970 cover letter, and the bill for $5,000 for services rendered—was the basis for Count 3 of the indictment against Zane and Silverman (the "obstruction of justice" count), of which Zane and Silverman were acquitted, and several perjury counts against Zane of which Zane was acquitted.

The Government also elicited testimony from two accountants to the effect that in their opinion the workpapers of Zane and Silverman in connection with the confirmation of the CDs did not satisfy their concept of generally accepted auditing standards* (T. 2460, 2505).

4. The Defense Case

Petitioners denied any knowledge, as of the time the Microthermal financial statement was prepared, signed, and submitted to the SEC, that the CDs in question did not exist. They testified that to the best of their knowledge and belief at the time, the financial statement was in all respects accurate (T. 2615-2616, 2920-2921). In substance, their testimony was as follows.

Silverman, who had previously done accounting work for Burns, received a call from Burns in early March,

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* Because of the relative financial smallness of their clientele, Zane and Silverman had never before had to confirm the existence of a certificate of deposit (T. 2955).

1970. Burns told him that a prominent member of the financial community (Galanis) required accounting services, and that Burns had recommended Silverman. At the time Silverman and Zane had just formed their two-man accounting partnership, and, in view of that and the impending tax season, were extremely busy. At Burns' suggestion, Silverman called Galanis and arranged to meet him (T. 2623-2630).

They met at Galanis' very well-appointed offices, which included a large stock quotation ticker board across the front of one room, with traders working there. Galanis explained that he wanted an analysis of documents (including numerous financial statements) relating to certain businesses in which Galanis was interested, in order to assist Galanis in determining the most economical way of selling mutual funds to the public. Silverman accepted the assignment at an agreed fee of $250 per man-day (T. 2626-2634).

About a week later, Galanis called Silverman to inquire whether any preliminary work had been done. During the conversation, Galanis said he had a friend who was president and chief officer of a public company (Microthermal) located in Florida, who was interested in retaining a New York accounting firm to prepare the financial statement to be submitted to the SEC as part of their Form 10-K. Silverman expressed interest and, within a few days, received a call from Morton Kaplan, the president of Microthermal. They agreed to meet during Kaplan's next trip to New York City, and petitioners were then retained to prepare Microthermal's financial statement (T. 2632-2635, 2651-2653).

At Silverman's request, Kaplan sent Zane and Silverman Microthermal's general ledger. On approximately

May 5, 1970, Microthermal's bookkeeper, Kathleen Plott, arrived in New York for the express purpose of assisting Zane and Silverman in the preparation of the financial statement. She stayed for three days, spending all this time reviewing with Zane and Silverman Microthermal's books and records (T. 2663-2668).

Microthermal's general ledger reflected, on a sheet entitled "Investments (Short Term)", the transfer to Takara Partners of $240,000 on October 31, 1969 and of another $240,000 on January 31, 1969. Kaplan informed Silverman that those moneys had been sent to Takara Partners for their investment in CDs, and that he (Kaplan) would supply written confirmation to Silverman. Shortly thereafter, Silverman received a letter from Kaplan's office dated May 18, 1970, enclosing a copy of the May 14, 1970 letter from the Franklin National Bank. Silverman informed Kaplan that the bank's letter was unacceptable because of its ambiguity concerning whether the CD was owned by Microthermal or by Kaplan personally, and because the letter had not been sent to Zane and Silverman directly by the Bank but had been transmitted by Kaplan. Kaplan said he would have the Franklin National Bank send directly to Zane and Silverman a letter which correctly reported the transaction (Z/SA 147; T. 2671-2677).

Thereafter, Silverman received directly from the Franklin National Bank a letter dated June 10, 1970, confirming the delivery by that bank to the Bank of New York of a $500,000 bearer CD for the account of Microthermal. This was the letter which Woodruff, the Franklin National Bank officer, identified at trial as the *second* June 10 letter. Both Silverman and Zane testified that they had never seen until trial the *first* June 10 letter, and had not known before trial of its existence (T. 2678-2679, 2930-2931).

In early June 1970, Zane and Silverman contacted Galanis to advise him that the work they had been doing for him was completed. On about June 10, Galanis came to Zane and Silverman's office, where the accountants reported to him. At that meeting, they gave him their bill for $5,000 for the accounting services they had performed for him personally (Z/SA 157), and he gave them his personal check for $5,000, which was completely unrelated to the Microthermal certification (T. 2688). Zane and Silverman also testified, and it was undisputed by Galanis or any other Government witness, that they neither asked for nor received from Galanis, Yamada, or Takara Partners the alleged $15,000 to $20,000 of additional accounting work as part of what Galanis and Burns had testified was the alleged bribe. It was also undisputed that Galanis had taken a total of $42,000 in deductions for accounting services on his 1970 federal income tax return (T. 560-561). Galanis' $5,000 check was deposited by Zane and Silverman in their partnership bank account and was reported on their income tax returns. The total fee they eventually received from Microthermal was $6,000 for the work which they had done for Microthermal (T. 2679-2680, 2688; Z/SA 153).

Zane and Silverman (and Persky) denied that the alleged large "Rozzo meeting" at Persky's office, to which Galanis, Yamada, and Burns had testified, ever occurred. Moreover, Zane testified that until trial, he had never seen Akiyoshi Yamada (T. 2735, 2932, 2940, 2943, 3263).

After receiving Galanis' check for $5,000 in June, petitioners' next contact with him was in September 1970, when Galanis called Silverman to request the return of the documents which Galanis had left with Zane and Silverman, and which contained Zane & Silverman's handwritten notations. By this time, Galanis and Yamada ad-

mitted at trial, they knew they were under investigation by the SEC, and neither had approached the Government to try to make their deals; in fact, Yamada testified that he and Galanis, in order to thwart the SEC's investigation, were actively attempting to accumulate, get back, and destroy documents relating to companies in whose stock they had been involved. Zane and Silverman had not yet learned that the SEC was investigating Galanis or Yamada. In response to Galanis' request, all the documents relating to the accounting work Zane and Silverman had done for him were returned to him in September, 1970 (T. 2689, 1612).

About half a year passed until Zane and Silverman received two SEC subpoenas duces tecum. The first, dated March 30, 1971, demanded production of documents relating to Microthermal and Morton Kaplan, and Zane and Silverman sent copies of their workpapers on the Microthermal audit to the SEC. On April 22, 1971, Zane and Silverman received a second subpoena, far more comprehensive than the first, and which demanded, *inter alia*, all documents relating directly or indirectly to Galanis (among others). At the time they received the second subpoena, they had previously returned to Galanis, at his request over half a year earlier, all the documents relating to services they had performed for him, and they therefore had nothing tangible to support the $5,000 fee they had received from him. They therefore called Galanis and asked him to return the documents to them, but Galanis claimed to be unable to find the documents (T. 2692-2696, 2934-2935).

For that reason, Zane made an appointment to meet Galanis at Galanis' office. There, Zane asked for a receipt for the documents that had been returned to Galanis. Instead, Galanis sat down at his typewriter, and typed out

a letter to Silverman, purporting to request the return of the documents which had been given by Galanis to Zane and Silverman and which they had subsequently returned to him; Galanis dated the letter September 24, 1970, to reflect the approximate date Galanis remembered having in fact requested the documents' return from Zane and Silverman (Z/SA 158). Zane offered to give Galanis a letter for Galanis' files dated October 3, 1970, purporting to be a letter from Silverman accompanying the return of the documents to Galanis by the accountants (Z/SA 159; T. 2935-2940).

Zane and Silverman submitted three documents to the SEC relating to their work for Galanis in response to the second subpoena and in response to a request made to Zane by an SEC attorney who interrogated Zane when Zane testified before the SEC: the bill for $5,000 given to Galanis in mid-June, 1970, the letter typed by Galanis dated September 24, 1970, and the letter offered by Zane to Galanis dated October 3, 1970. Zane's and Silverman's testimony at trial that their intent when submitting these documents to the SEC was not to obstruct the SEC's investigation but to provide the SEC with a true picture of the services they had actually performed for Galanis, was, as will be hereinafter described, accepted by the jury.

5. The factual theory implicit in the jury's verdict

The jury acquitted Zane and Silverman on Count 1, which charged them with being knowing participants in the conspiracy to knowingly and wilfully file the false and misleading Form 10-K with the SEC, in connection with which Zane and Silverman were alleged to have accepted a $5,000 bribe from Galanis.

The jury acquitted Zane and Silverman on Count 3, which charged them with obstruction of justice by the submission of the three documents previously described relating to accounting services they had performed for Galanis personally.

The jury acquitted Zane of five of the seven perjury counts,* including the three counts (Count 7, Count 10, and Count 11) in which it was alleged that Zane had perjured himself by testifying that the $5,000 payment from Galanis was for services Zane and Silverman performed for Galanis personally, and was unrelated to the Microthermal audit.

Thus, petitioners respectfully submit, the jury's verdict reflected findings that neither Zane nor Silverman was a knowing participant in the conspiracy to file a false and misleading financial statement, and that Galanis' $5,000 payment to Zane and Silverman was not a bribe for their certification of a false financial statement, but was payment for legitimate accounting services Zane and Silverman had actually performed for Galanis personally.

Subsequent to returning its verdict reflecting these findings, and after over three hours of further deliberations, the jury convicted petitioners on Count 2, which charged them with the substantive offense of knowingly filing, or knowingly aiding and abetting the filing of, the false Form 10-K.

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* Silverman did not testify before the SEC. The testimony of Zane and Silverman at trial, and of others who described their alleged activities, was such that, in the words used by the prosecutor in summation, the two were "a duo . . . I do not refer to them disparagingly as a duo, but . . . when Zane spoke it was like Silverman, and vice versa, there has been no effort to separate them, and I will refer to them jointly as Zane and Silverman . . ." (T. 3995).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals approves petitioners' convictions on Count 2 by rejecting standards of *res judicata* previously established by this Court and guaranteed by the constitutional proscription against double jeopardy contained in the Fifth Amendment to the United States Constitution.

In *Sealfon* v. *United States*, 332 U.S. 575 (1948), this Court held that the acquittal of a defendant charged with conspiracy to commit a substantive offense barred, under the principle of *res judicata*, a subsequent prosecution for aiding and abetting the commission of the substantive offense where the jury's verdict in the conspiracy prosecution necessarily determined in the defendant's favor the factual element which would have been required for a conviction in the subsequent prosecution for the substantive offense. Similarly, in *Marakar* v. *United States*, 370 U.S. 723 (1962), this Court ordered dismissal of an indictment charging the defendants with the substantive offense of narcotics importation following their acquittal of conspiracy to commit that substantive offense. Thus, this Court has carved an exception out of the general principle that "consistency in the verdict is not necessary." *Dunn* v. *United States*, 284 U.S. 390, 393 (1932).*

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* The *Dunn* rule has itself been subject to question by certain jurists; see, *e.g.*, the concurring opinion of Judge Hastie of the Third Circuit in *United States* v. *Vastine*, 363 F.2d 853, 855 (3d Cir. 1966):

> "I express my opinion that an enlightened jurisprudence should not thus permit the jailing of accused persons on a record exhibiting verdicts in which a jury simultaneously says 'yes' and 'no' in answer to a single critical question. In these circumstances, a judge of an inferior court can do no more than express his hope that the rule of the *Dunn* case will soon be reconsidered and abandoned."

The United States Court of Appeals for the Second Circuit has itself held that the *Dunn* rule is inapplicable in a non-jury trial. *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960).

It is respectfully submitted that under the principle enunciated by this Court in *Scalfon*, the jury's acquittal of petitioners on a total of nine counts of the indictment after a day and a half of deliberation precluded their returning guilty verdicts the following day after additional deliberations of over three hours. Moreover, it is respectfully submitted that petitioners' convictions on Count 2, under the circumstances of this case, violated the double jeopardy clause as recently interpreted by this Court.

It is clear that the jury, after having reached the factual conclusions implicit in petitioners' acquittals on Counts 1, 3, 6, 7, 9, 10 and 11, continued in their deliberations and reached additional factual conclusions totally inconsistent with their previous acquittals.

At approximately 5:20 p.m. on June 12, 1973, the jury's second day of deliberations, the jury returned verdicts of acquittal on Counts 1, 3, 6, 7, 9, 10 and 11, and reported themselves deadlocked on the remaining counts (T. 4180-4186). Petitioners' counsel immediately moved for dismissal of the remaining counts (Counts 2, 8, and 12) on the grounds that:

> "In view of the verdict that this jury has returned on the counts that it has returned verdicts on, there is no rational way that they could return any verdict but not guilty on the other counts, and I respectfully ask for a dismissal at this time on the counts that are undecided." (T. 4187)

Petitioners' motion was denied.

The following morning, the jury reported at 9:30 a.m. (T. 4189), and received the Allen charge. Half an hour later, the jury sent out a note which stated:

> "One juror feels that he/she would not be able to change his/her vote on Count 2 without also

> changing it on Count 1, which has already been unanimously decided and presented to the court. This juror feels that a change of vote on the one count necessitates a change in vote on the other. What then?" (T. 4194)

Petitioners' counsel renewed the previous day's motion for acquittal on the remaining counts based on the jury's previous verdicts of acquittal, and moved alternatively for a mistrial on the open counts (T. 4195-4196). The Court denied the motions, and instructed the jurors that:

> "In answer to the last note I must instruct the jury that it is too late to change any votes on which a verdict has been rendered. Count 1 has been decided, and no vote can be changed on that count. Counts 1 and 2 charge separate and distinct offenses. The jury should consider and decide Count 2 if the jurors can reach a unanimous agreement after taking into account all my instructions. Also, the jurors should consider and decide Counts 8 and 12." (T. 4200-4201)

Petitioners' counsel objected on the grounds that:

> "Your Honor, I most respectfully object to your Honor's proposed statement to the jury that Counts 1 and 2 charge separate and distinct offenses. Although it may be that read in the abstract, Section 371 of Title 18 is different from the sections of Title 15 which are cited at the end of Count 2 in this indictment, nevertheless, it seems to me that as a factual matter these are not separate and distinct offenses. Count 2, your Honor, is a page and one half as it appears in the indictment. It is three paragraphs. Paragraph 3 incorporates by reference —that is, paragraph 3 of Count 2 incorporates by

reference paragraph 3 of Count 1. Paragraph 3 of Count 1 in turn, your Honor, is about 90 per cent or 80 per cent of Count 1, and apart from the boilerplate language I think Count 2 from a practical, factual point of view is virtually identical to Count 1." (T. 4199-4200).

Thereafter, at 11:15 a.m., the jury sent out another note requesting certain exhibits (T. 4201). An hour and a half later, at 12:45 p.m., the jury reported its guilty verdict on Count 2 as to all defendants (but was unable to decide on Counts 8 and 12 as to petitioner Zane) (T. 4202-4203).

Thus, a full evening and over three hours of deliberations intervened between the jury's verdicts of acquittals and their verdict of guilty on one count. It is apparent from the lengthy period of time which transpired and from the notes sent by the jury to the Court on the third day of deliberations that the verdicts of acquittal were not simply gifts of leniency by a jury which had already concluded that conviction on one count would suffice for purposes of punishment. Rather, the jury on the previous day had reached a rational decision that these appellants were not guilty of the offenses charged in Counts 1, 3, 6, 7, 9, 10 and 11.

The only distinction between this case and *Sealfon* is that in *Sealfon* the verdict of guilty on the aiding and abetting charge, which this Court vacated in dismissing the indictment, was returned at a separate trial following the defendant's earlier acquittal on the conspiracy indictment; here, the aiding and abetting charge (Count 2) was tried in the same indictment as the conspiracy charge. Petitioners respectfully submit that this is a distinction without a difference. What is significant is not the number of trials to which the defendant is subjected, but the

process by which the jury returns its verdict; in both *Sealfon* and the instant case, the jury, after the defendants were acquitted, deliberated and reached a verdict totally inconsistent with the jury's previous verdict. That a subsequent verdict is deliberated upon and rendered by the same and not a different jury is not, petitioners respectfully submit, a distinction of constitutional significance. What is significant is the element common to this case and *Sealfon*: that a jury rationally reached a verdict of acquittal, and then irrationally reached a verdict factually inconsistent with the earlier verdict.

2. The Court of Appeals approves petitioners' convictions by applying a standard of appellate review which assumes petitioners' guilt of offenses as to which they were specifically acquitted by a jury, in violation of the due process clause of the Fifth Amendment to the United States Constitution.

The opinion of the panel states that at the large "Rozzo meeting", when Zane and Silverman allegedly agreed to certify the financial statement notwithstanding their alleged knowledge of its inaccuracy, "it was agreed that Zane and Silverman's fee for the [Microthermal] audit, previously set at $6,000., would be increased by $5,000." (Slip Op. at p. 2499). It is respectfully submitted that this statement contradicts the fact that Zane and Silverman were acquitted by the jury of the four specific counts in the indictment which charged them with having received an alleged $5,000. bribe.

As previously described, one of the major disputed issues at trial was whether the $5,000. paid by Galanis to Zane and Silverman was, as Galanis testified, a bribe

paid to the accountants to knowingly and wilfully certify a false financial statement for Microthermal, or, as Zane and Silverman testified, mere payment for independent accounting services rendered by Zane and Silverman to Galanis which was wholly unrelated to the Microthermal audit. There were four counts in the indictment which specifically charged that the $5,000. had been a bribe rather than an unrelated payment for other accounting services:

1. Count 3 charged, in substance, that Zane and Silverman obstructed justice by submitting "false and fraudulent documents" to the SEC "to cover up the fact that they had received $5,000. in additional unlawful compensation in connection with the preparation and filing of financial statements for Microthermal";

2. Counts 7, 10, and 11 charged, in substance, that Zane committed perjury when he testified before the SEC that he and Silverman performed accounting services for Galanis and received the $5,000. for those services and not in connection with the Microthermal audit.

The jury acquitted Zane and Silverman of each of these counts. Thus, it is respectfully submitted, the statement in the Court of Appeals' opinion that the $5,000. received by Zane and Silverman was a bribe in connection with the Microthermal audit, rather than a legitimate payment for other accounting services, is totally contradicted by the jury's verdict.

The application by the Court of Appeals of this erroneous factual background directly affected that Court's resolution of other issues raised by petitioners' appeal. Thus, for example, in the Court of Appeals' opinion with respect to the issue of whether the jury's acquittal of petitioners on numerous counts barred their conviction

on Count 2 under the doctrine of *United States* v. *Sealfon, supra,* the Court of Appeals framed the legal issue as follows:

> "The first question to be considered is whether the jury's not-guilty verdict with respect to Count One (conspiracy to file the false Form 10K Annual Report) barred it from later entering a separate verdict of guilty with respect to Count Two (substantive offense of filing the false Form 10K Annual Report itself)." (Slip Op. at 2500)

The question, however, is not merely whether petitioners' acquittals on Count 1 bar petitioners' convictions on Count 2, but whether the acquittals of petitioners Zane and Silverman on Count 1 and on seven other counts—including Counts 3, 7, 10, and 11—bar their convictions on Count 2.

Moreover, the Court of Appeals, in finding that several errors were committed by the District Court, held such errors to be harmless under the standard of *Chapman* v. *California,* 386 U.S. 18 (1967) when viewed against the factual background of this case. (See Points 4, 5, and 6, *infra*). However, it is respectfully submitted that these errors could not conceivably be deemed harmless under the *Chapman* standard when viewed against the factual background of the jury's verdict, rather than the far different factual background which was alleged in the indictment and which was accepted as true by the Court of Appeals notwithstanding the jury's large-scale acquittals of petitioners on nearly every count of the indictment.

Furthermore, the jury's acquittals of Zane and Silverman on those counts charging their receipt of the $5,000.

as a bribe, in addition to their acquittals on the conspiracy and other counts, rebuts the Court of Appeals' suggestion that the jury's verdict on Count 2 was not inconsistent with the remainder of their verdict. To convict on Count 2, the jury was required to find that Zane and Silverman knew of the CDs' non-existence. Yet their alleged knowledge of this fact, as testified to by the Government's witnesses at trial, was alleged to have been imparted to them during the course of their having been offered and having accepted the $5,000. bribe, which the jury concluded never occurred, as reflected in their verdicts on Counts 3, 7, 10, and 11.

3. The decision of the panel extends the "co-conspirators exception" to the hearsay rule far beyond the accepted rationale underlying this exception, in violation of petitioners' right to confront the witnesses against them, as guaranteed by the Sixth Amendment to the United States Constitution, and further deprived petitioners of their right to due process of law guaranteed by the Fifth Amendment to the United States Constitution.

A vast amount of hearsay testimony was admitted at trial against petitioners, over objection, based upon the "co-conspirators exception" to the hearsay rule—most significantly, out-of-court declarations allegedly made by Microthermal's president, Morton Kaplan (who did not testify at trial), who was alleged by Government witnesses to have said that petitioners were hired to replace Arthur Andersen & Company as Microthermal's accountants because of Arthur Andersen's alleged unwillingness to certify the financial statement.

Petitioners, while not disputing the long-standing rule that out-of-court declarations of co-conspirators made in furtherance of the conspiracy are exceptions to the hearsay rule and admissible in evidence, respectfully submit that the rationale underlying this rule is wholly inapplicable where, as here, a conspiracy is actually charged and the jury returns a verdict of not guilty on the conspiracy charge and then, later, returns a verdict of guilty on the substantive offense. The Court of Appeals' decision, in stating that the traditional rule applies notwithstanding the jury's acquittal of petitioners on the conspiracy charge prior to their conviction on the substantive counts, cites (at Sup Op. 2507) as the sole precedent for this holding *United States* v. *Pugliese*, 153 F. 2d 497 (2d Cir. 1945). However, in *Pugliese* the defendant "was not indicted for conspiracy." 153 F.2d at 500.

The rationale underlying the "co-conspirators exception" to the hearsay rule even in the absence of a specific conspiracy charge is, as explained by Judge Learned Hand in *Pugliese*, "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another . . . [and] what one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all." 153 F.2d at 500. However, in the instant case, the jury rendered an actual verdict of not guilty on the conspiracy count. The Court of Appeals thus has extended the "co-conspirators exception" to the hearsay rule to a situation in which the jury specifically acquitted petitioners of the broad charges whose existence is said by the Court of Appeals to justify the hearsay testimony. This, petitioners respectfully submit, deprives petitioners of their right to cross-examine witnesses against them as guaranteed by the Sixth Amendment to the United States Constitution. Further-

more, the introduction of such testimony on a theory (conspiracy) as to which petitioners were specifically acquitted by the jury deprived petitioners of their right to due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

4. The Court of Appeals, in affirming petitioners' convictions notwithstanding the trial court's prohibiting petitioners' counsel from cross-examining an essential Government witness, deprived petitioners of their right of confrontation as guaranteed by the Sixth Amendment to the United States Constitution.

Lester Green, an attorney for the SEC, testified in rebuttal that Persky, Microthermal's attorney whose case was jointly tried with petitioners, met with Green and with the prosecutor before trial and discussed the facts of the case. Green testified that Persky told him that a meeting allegedly held in May 1970, attended by Zane and Silverman (and others), "had to do with the fact that they were waiting for the confirmation of certificates of deposit . . . from Takara Partners at that time to come in for the purposes of the audit, and that they weren't coming in exactly at that time." (T. 3703). This testimony directly contradicted Zane's and Silverman's testimony that no such meeting occurred, directly contradicted Zane's and Silverman's testimony that they expected the confirmation to be provided by Morton Kaplan and not by Takara Partners, and directly contradicted Zane's and Silverman's testimony that no fact ever came to their attention to indicate the CDs' non-existence—as would have been most strongly indicated to them if they had attended the meeting and had participated in a discussion about the alleged fact

that the confirmation was late, as testified to by Green. Moreover, Green also testified that Persky told him that another meeting had taken place in June 1970, at which "Mr. Silverman was there . . . [Persky] had seen the [first] June 10 letter that had come in—that had been given to him somehow and . . . there was some question about this particular letter." (T. 3704). The obvious inference from this testimony would be that Silverman was present when the letter was seen and discussed; at the very least, under the standard for determining whether constitutional* error is harmless, it cannot be deemed to have been "harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). As the Court of Appeals' opinion notes (at Slip Op. 2511, fn. 8), if either accountant had seen or heard of the first June 10 letter, "the discrepancy between the two letters would normally have obligated them to do more checking than they actually did concerning the certificate"—a factor bearing directly and heavily on petitioners' convictions on Count 2, which reflected a jury finding that the petitioners knew of the CDs' non-existence. Green's testimony was therefore crucial on the one count as to which petitioners were convicted.

After Green was called as a Government rebuttal witness but before he began testifying, counsel for petitioners objected to his proposed testimony (the prosecutor had previously informed counsel of the substance of Green's proposed testimony), on the grounds that Per-

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* The Sixth Amendment right of any defendant to be confronted with the witnesses against him "include[s] the right to cross-examine those witnesses," a right which "is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 401, 405 (1965).

sky's alleged statements to Green had been made over a year and a half after the conspiracy had (according to the indictment itself) terminated. The objection was overruled. Petitioners requested a severance, which the trial Court denied. Then, the Court specifically forbade counsel for petitioners from conducting *any* cross-examination of Green. The Court instructed the jury:

> "Since the evidence is not offered against Mr. Frankel's clients, there's no reason for him to cross-examine. He said he wants to cross-examine, but I won't permit it. It is a wholly improper request."* (T. 3706)

It is respectfully submitted that the Court's precluding cross-examination by petitioners of Green directly violated the principle enumerated by this Court in *Bruton* v. *United States*, 391 U.S. 123 (1968), and that under the principles of *Bruton* the Court's instruction to the jury cannot be deemed to have cured the Court's error. The Court of Appeals' opinion, while not approving the trial Court's precluding cross-examination of Green on petitioners' behalf ("we fail to detect any impropriety in permitting such cross-examination", Slip Op. at 2511), nevertheless held that Green's testimony merely "tracked what Persky had testified to at trial" (Slip Op. at 2511). This, however, is not accurate, as Persky testified that he did not know whether Silverman was present when the first June 10 letter was shown to Persky (T. 3207); indeed, when Persky was cross-examined by counsel for petitioners, Persky conceded having testified under oath before the grand jury that the letter shown to Persky at the June

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* The trial Court later retracted its statement concerning the impropriety of the request, but still did not permit petitioners' counsel to conduct any cross-examination of Green (T. 3720, 4123).

meeting was the May 14 letter from the Franklin National Bank, not the first June 10 letter (T. 3271-3272). Furthermore, it is respectfully submitted that Persky's alleged statement to Green that Persky felt "uneasy" at the meeting was, in context, incriminating to Zane and Silverman; for in evaluating whether or not Zane and Silverman knew of the CDs' non-existence, the jury may very well have concluded that if the circumstances and discussions of the meeting were such as to make Persky feel "uneasy", anyone else at that meeting must have been aware of the same factors that allegedly made Persky uneasy, and must therefore also have been "uneasy", *i.e.*, must have had reason to know that the CDs may not have existed.

5. The Court of Appeals, in sustaining petitioners' conviction notwithstanding conceded error in the trial court's limitation of petitioners' right to cross-examine Yamada, improperly curtailed petitioners' right of confrontation as guaranteed by the Sixth Amendment to the United States Constitution.

To evaluate the limitations imposed on petitioners' cross-examination of Yamada, it is necessary to describe briefly the allegations of Count 4 of the indictment (which was not asserted against Zane and Silverman, and which was severed pre-trial). Count 4 alleged a criminal conspiracy which commenced at about the time when the conspiracy alleged in Count 1 was ending, and in which certain co-conspirators (not including Zane or Silverman) engineered a sham transaction pursuant to which one Ramon D'Onofrio, a controlling shareholder of U. S. Secretarial Institute Ltd. (hereinafter "Secretarial"), in exchange for a $50,000 bribe, agreed on behalf of Secretarial that Secretarial would transfer a minority portion of its common stock to Microthermal in exchange for an empty envelope

purportedly containing the "CDs" that had been the subject of the Count 1 conspiracy. Thus, Microthermal's book entries reflecting the CDs which were the subject of the Count 1 conspiracy could be disposed of on paper.

Count 4 alleged that the sham transaction was actually consummated, and that Yamada signed a "delivery receipt" on behalf of Takara Partners acknowledging delivery of the $375,000 in CDs purportedly held by Takara Partners for Microthermal (Z/SA 30, 150).

In fact, it was undisputed that Yamada had signed such a letter on November 20, 1970. However, Yamada had previously testified under oath before the SEC that the letter had been written and signed in good faith and with Yamada's complete belief in the truth of its contents (T. 1624-1626).

Before making his deal with the Government, Yamada testified for four and one-half days before the SEC; at trial, he testified that most of that SEC testimony was perjurious, and that he prepared for each day's perjury by reviewing documents with his attorney the night before to structure his lies against documents he knew he would be confronted with (T. 1594-1596).

One of the documents he was shown by the SEC attorneys was his letter to Microthermal dated November 20, 1970, which stated that Takara Partners had transferred $375,000 in Microthermal CDs to Secretarial. When Yamada appeared before the SEC, he was shown this letter and testified:

> "Q. Now, as I understand your testimony, you saw certain documents which established to your satisfaction that these certificates had, in fact, been transferred to [Secretarial], is that correct?
> A. Yes." (T. 1632)

The trial Court refused to permit counsel for Zane and Silverman to introduce the letter (which was marked Exhibit Q for identification, and is reproduced at Z/SA 150) into evidence, and further refused counsel permission to cross-examine Yamada based upon that letter and upon Yamada's above-quoted statement that he believed in its contents at the time the letter was written, and that he had seen documents which satisfied him as to the truth of its contents as of November 1970 (T. 1624-1627, 1631-1632).

Petitioners' position, based upon Yamada's testimony before the SEC and Exhibit Q, was that Yamada had nothing to do with the scheme conceived and executed by Galanis and Kaplan that resulted in the letters from the Franklin National Bank; that Yamada had nothing to do with the Microthermal situation; and that Yamada's testimony with respect to Microthermal was simply his attempt to broaden the scope of his "cooperation" with the Government in order to get the best possible deal for himself. In short, petitioners' position was that Yamada had testified truthfully before the SEC with respect to Microthermal, and was committing perjury at trial—not, as Yamada claimed at trial, vice-versa. It is significant that Yamada himself admitted that he had not made his deal with the Government until mid-1972; that he knew, as of the time he made his deal, that Galanis had already accused two accountants named Zane and Silverman of participating in the Microthermal conspiracy; that by virtue of having been served with an SEC civil complaint which detailed, among other things, the alleged Microthermal conspiracy, Yamada knew of the alleged role which Galanis had ascribed to Zane and Silverman in Galanis' conversations with the SEC attorneys (T. 1607-1610).

Petitioners offered into evidence Exhibit Q; the Government's objection was sustained. Petitioners sought to impeach Yamada's credibility by confronting him with a prior inconsistent statement made under oath to the SEC, in which he testified that he had seen documents which established to his satisfaction, as of November 1970, that the CDs existed and had in fact been transferred to Secretarial; the Government's objection was sustained. When the Government on re-direct asked Yamada whether he knew, as of November, 1970, that the CDs did not exist (to which Yamada answered in the affirmative), petitioners again sought, on re-cross, to introduce Exhibit Q and Yamada's prior inconsistent statement; the Government's objection was sustained (T. 1624-1627, 1631-1632, 1758, 1794-1795).

The trial Court further restricted cross-examination of Yamada in another material respect. Petitioners' counsel, in order to test Yamada's credibility concerning his testimony of the alleged role he played in the conspiracy, asked Yamada to describe how the Franklin National Bank had been deceived into issuing their false confirmation; the Government's objection was sustained (T. 1787-1788).

Petitioners renewed their request for permission to cross-examine Yamada on these areas (or alternatively for a severance) later in the trial, when the Government provided to petitioners a cassette recording of a conversation between Kaplan and Yamada, which had been secretly recorded by Kaplan.* As reflected in the cassette, Yamada told Kaplan, "They may have closed the U. S. Secretarial deal. I don't know anything about the deal. I

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* The Court expressly excused the lateness of this application, which had been due to the inability to secure a recorder capable of playing the cassette (T. 3233).

don't even know what U. S. Secretarial is . . . I didn't know anything about U. S. Secretarial . . . *I didn't know what Galanis was doing.*" (T. 3232-3233). In view of the contents of the cassette, petitioners renewed their request to introduce Exhibit Q into evidence and to cross-examine Yamada on Exhibit Q, on Yamada's previous testimony to the SEC, and on the cassette itself. The trial Court again denied the application (T. 3231-3235).

It is respectfully submitted that the Court of Appeals, in sustaining the trial Court's rulings, deprived petitioners of their right to cross-examine a key witness against them. The opinion of the Court of Appeals, while stating that

> "had we been exercising a trial judge's discretion in the matter we probably would have admitted the letter as tangible impeaching evidence tending to support the argument that Yamada may have been testifying truthfully regarding the certificate before the SEC and lying at trial" (Slip Op. at 2514),

nevertheless held that the trial Court's exclusion of the evidence was not an abuse of discretion requiring reversal. In support of its holding, the Court of Appeals states that Yamada's letter, written in November, 1970, "would not necessarily have served to impeach his trial testimony relating to his beliefs in May and June of 1970" (Slip Op. at 2514). It is respectfully submitted that this assertion is wholly inaccurate; surely, if in November, 1970 Yamada believed that the CDs existed, he would have believed five or six months earlier that they existed, for the purported transfer of United States Secretarial in November was a transfer of the same purported CDs about which Yamada testified at trial.

6. The Court of Appeals, in sustaining the trial court's denial of petitioners' application for an order requiring Yamada to attempt to identify petitioners either in a line-up or under other non-suggestive circumstances before permitting Yamada to identify petitioners under the suggestive circumstances of the courtroom, has sanctioned identification procedures which violate the standards established by this Court and guaranteed by the due process clause of the Fifth Amendment to the United States Constitution.

Akiyoshi Yamada gave testimony at trial which was extremely prejudicial to petitioners, and which petitioners sharply disputed. He testified that Kaplan had said that the reason Microthermal changed accountants from Arthur Andersen & Company to Zane & Silverman was because Arthur Andersen "wouldn't be friendly toward" Microthermal and "wasn't about to certify the financial statements"; that Galanis told Yamada that Burns claimed that Zane and Silverman "had worked before with Mr. Burns, and Mr. Burns had them in his hip pocket," and although "it would cost us money, they would be more than cooperative"; that Yamada was allegedly present with Zane and Silverman (and others) at the large "Rozzo meeting", in which the non-existence of the CDs was allegedly discussed in Zane's and Silverman's presence; and that at that conference Yamada called Kirschbaum to attempt to secure false confirmation of the CDs' existence (T. 1553, 1560-1572).

As previously noted, Zane and Silverman unequivocally denied that they attended any such meeting (if indeed the meeting ever had occurred). Moreover, Zane testified that he had never before seen Yamada until Yamada walked into court to testify.

Before Yamada testified, counsel for petitioners informed the Court that there was an identification issue, and requested that the Court order a line-up in which Zane and Silverman would appear, with others, to test Yamada's ability to identify either of them; alternatively, counsel requested that Yamada be brought into the courtroom outside the jury's presence before beginning his testimony, and that Yamada be asked under these informal but non-suggestive circumstances whether he could identify either Zane or Silverman. There had been no previous out-of-court confrontation between Yamada and petitioners subsequent to their alleged meetings in 1970, either in person or by photographs. In fact, Yamada testified at trial that he had allegedly seen Zane on only one occasion before trial—at the alleged "Rozzo meeting" (which petitioners denied having attended)—and had seen Silverman only twice, once at the "Rozzo meeting" and once before that alleged meeting (T. 1009-1011, 1598).

Appellants' motion was raised and renewed on three different occasions. The trial Court denied the motion on each occasion (T. 1009-1011, 1094-1100, 1404).

When Yamada testified (in the jury's presence), he recognized defendant Persky immediately; indeed, Persky had not raised any identification issue vis-a-vis Yamada, testifying that they had met on numerous occasions (none of which involved criminal activities, Persky testified). But previous to Yamada's being asked by the prosecutor to attempt to identify Zane and Silverman, and while Yamada was in the courtroom and on the witness stand, the prosecutor requested and received permission for all counsel to approach the bench. When all counsel went to the bench, only three individuals were seated at the defense table—Zane, Silverman, and Persky—and Yamada plainly knew who Persky was. Thus, only Zane and Sil-

verman remained at counsel table, and Yamada knew at the time that two accountants named Zane and Silverman were on trial with Persky (T. 1500, 1516-1517, 1574, 1590-1591, 1607-1610).

Thus, it was not surprising, when Yamada was finally asked to identify petitioners. that he pointed to the twosome of Zane and Silverman and identified them as "Zane and Silverman". Most significantly, however, he admitted that he did not know which of the two was Zane, and which of the two was Silverman (T. 1574, 1590).

Under these circumstances, appellants respectfully submit that the trial Court erred in refusing appellants' motion to compel a confrontation between Yamada and petitioners in a non-suggestive setting—either in a formal line-up or, informally, in a non-suggestive courtroom arrangement.

A confrontation between a witness and a defendant which is "unnecessarily suggestive and conducive to irreparable mistaken identification" constitutes a denial of due process of law. *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967). Yamada's courtroom identification of Zane and Silverman was made under clearly suggestive circumstances, as Zane and Silverman were the only two individuals left for Yamada to attempt to identify as Zane and Silverman. The fact that the suggestive confrontation occurred in a courtroom, rather than at a police station or on the streets, does not reduce the degree of the constitutional violation, and the suggestive courtroom confrontation is subject to judicial scrutiny and to the sanction of suppression. *United States* v. *Roth*, 430 F.2d 1137 (2d Cir. 1970), cert. denied 400 U.S. 1021; *Mason* v. *United States*, 414 F.2d 1176 (D.C.Cir. 1969); *United States* v. *York*, 426 F.2d 1191 (D.C.Cir. 1969). Impermissible sug-

gestiveness may result merely from a courtroom setting in which the defendants are plainly distinctive. *United States* v. *Gambrill,* 449 F.2d 1148, 1158 (D.C.Cir. 1971).

The Court of Appeals, while conceding that "the identification issue assumed some importance", nevertheless held that the trial Court's failure to order a line-up did not "amount to an abuse of discretion." (Slip Op. at 2521). The Court stated, however, that "it appears most unlikely that the in-court identification, even if labeled impermissibly suggestive, was the source of Yamada's identification." (Slip Op. at 2521-2522). However, this statement is tantamount to a finding of fact by the Court of Appeals that Zane was present at the Rozzo meeting, since by Yamada's own testimony that was Yamada's only alleged pre-trial opportunity to see Zane. It is respectfully submitted that there was no basis for the Court of Appeals to make any such finding of fact, and it would appear that such a finding is made only under the factual background as charged in the indictment and as adopted by the Court of Appeals, rather than as reflected in the jury's verdict (see *supra,* Point 2).

Moreover, the Court of Appeals notes that no "hearing on the identification issue" was requested (Slip Op. 2521). It is respectfully submitted that this suggested procedure turns the identification standards prescribed by this Court inside-out, since the purpose of a hearing is to determine whether an in-court identification is tainted by an impermissibly suggestive confrontation, whereas the purpose of conducting a line-up before permitting Yamada to view Zane and Silverman in the courtroom (as requested by petitioners) was to prevent the suggestive confrontation from actually occurring in the courtroom in the first instance.

CONCLUSION

For these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS BENDER
Attorney for Petitioners

SANDOR FRANKEL,
Of Counsel

APPENDIX A

Decision and Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 560, 561—September Term, 1973.

(Argued December 14, 1973 Decided April 1, 1974.)

Docket Nos. 73-2401, 73-2450

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

PHILIP ZANE, JEROME E. SILVERMAN, ROBERT S. PERSKY,

Defendants-Appellants,

—and—

MORTON S. KAPLAN, CHARLES FISCHER, RAMON N. D'ONOFRIO, and U.S. SECRETARIAL INSTITUTE, LTD.,

Defendants.

Before:

LUMBARD and MANSFIELD, *Circuit Judges,* and GURFEIN, *District Judge.**

Appeal from a judgment of conviction entered after a jury trial in the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* for filing a false Annual Report (10K) with the Securities and Exchange Commission.

Affirmed.

* Of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

SANDOR FRANKEL, Esq., New York (Louis Bender, Esq., New York, N.Y., of counsel), *for Appellants Zane and Silverman.*

JOHN L. O'DONNELL, Esq., New York, N.Y. (Olwine, Connelly, Chase, O'Donnell & Weyher, New York, N.Y., of counsel), *for Appellant Persky.*

JAMES E. NESLAND, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, John D. Gordan III, Assistant United States Attorney, of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

Upon this appeal we have been required to review the 4300-page record of a five-week jury trial, which resulted in the conviction of a lawyer and two accountants for filing a false Form 10K Annual Report with the Securities and Exchange Commission ("SEC"), 15 U.S.C. §§78o and 78ff, to determine whether there is merit to any of the numerous claims of error asserted by appellants. The multi-count indictment under which appellants were tried charged first that they, along with two other defendants, conspired to file the false Annual Report for Microthermal Applications, Inc. ("Microthermal") with the SEC (Count 1); second, that appellants actually filed the false report with the SEC (Count 2); and third, that appellants Zane and Silverman obstructed the SEC's investigation into the filing of the false report (Count 3). The remaining counts, 6-12, charged that Zane perjured himself before the SEC during its investigation.[1] On June 12, 1973, the jury ren-

1 Counts Four and Five were severed from the trial at the instance of Zane and Silverman.

dered not-guilty verdicts on Counts One, Three, Six, Seven, Nine, Ten and Eleven. After a supplemental charge and further deliberation, the jury on June 13, returned a guilty verdict on Count Two, the substantive offense, and reported itself unable to agree on the remaining counts, Eight and Twelve. Appellants were each sentenced to a two-year split sentence (four months to be served and the balance suspended) on the basis of their conviction on Count Two. After considering the many points raised on this appeal, we find none that warrants a reversal.

The action in this Byzantine plot began in 1969 when the organizers of Microthermal, a new publicly held venture with no operating history whose shares were traded on the OTC market, raised $800,000 from a public offering of its stock in July of that year. The prospectus indicated to the investors that at least $300,000 of the proceeds would be invested in relatively safe securities such as certificates of deposit, government bonds or other interest-bearing obligations. Morton Kaplan, president of Microthermal, had other plans in mind for these monies. Between October of 1969 and January of 1970 he made cloaked transfers of $480,000 of the newly raised funds to Peter Galanis and Akiyoshi Yamada, principal operators of a hedge fund known as Takara Partners, of which they were members.

No sooner had Kaplan completed these transfers as a loan in violation of the prospectus than he set about concealing that fact. After the first transfer in October, 1969, Robert Persky, secretary of Microthermal and partner in the law firm that acted as general counsel to Microthermal, drafted a contract that showed $240,000 of the $480,000 to have been invested in securities of the Delanair Corporation, which Takara Partners held in their portfolio. The purpose of this contract, according to Yamada, was to conceal the real nature of the transaction, which was to infuse money into Takara, a cash-poor company. In Janu-

ary, 1970, Kaplan transferred another $240,000 of Microthermal's money to Takara Partners, this time to bail out a personal investment he and Persky had made in the hedge fund.[2] This misuse of Microthermal's funds might never have been discovered if Takara Partners had been able to repay them. But repayment became impossible because the funds were dissipated, in this case through the purchase by Galanis and Yamada of high risk securities.

The moment of truth, when Microthermal would first face the necessity of disclosing the loss, loomed on the horizon as the time for filing Microthermal's Form 10K Annual Report with the SEC approached. (Microthermal's fiscal year ended on January 31, 1970.) That Report, which was due on May 31, 1970, required Microthermal to set forth the interest-bearing obligations in which it had presumably invested the $480,000, bearing the usual certificate of a certified public accountant to the effect that the statement reflected its audit made in accordance with generally accepted auditing standards and accounting principles. To satisfy this requirement Microthermal faced an audit by its accounting firm, Arthur Andersen & Co., which it was feared would not attach its certificate to the Report unless and until it was shown the securities representing the investment or other satisfactory evidence of Microthermal's ownership of them. Faced with this crisis, which was directly attributable to their own fraud, Kaplan and Persky sought to enhance their prospects of success in concealing the misappropriation of the funds by replacing Arthur Andersen & Co. with a firm that could be more "flexible" in its approach than generally accepted auditing standards

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2 Kaplan and Persky had together invested some $200,000 of their personal fortune in Takara Partners in a 90-day "put." When it became apparent that Takara Partners' cash flow was little more than a trickle, Galanis prevailed upon Kaplan to transfer another $240,000 of Microthermal's funds to Takara Partners to be used to repay Kaplan's and Persky's personal investment.

and accounting principles would permit. They found such a firm in the persons of Philip Zane and Jerome Silverman. Over a series of meetings with Kaplan, Persky, Galanis and Yamada, the two accountants were introduced to the plot. They were asked to certify the existence of a certificate of deposit for the $480,000. Galanis for his part agreed to generate some documentation for the purported certificate.

Galanis proceeded to weave a tangled web of falsity. He enlisted the services of one Richard Kirschbaum who, in turn, approached Charles Fischer as a person who might be of assistance in creating evidence of a certificate of deposit which did not in fact exist. Fischer advised that it was impossible to borrow a certificate of deposit. However, he came up with a scheme that was to lead to the indictment in this case. In a nutshell this scheme was to purchase a certificate in Microthermal's name, obtain a letter from the seller confirming the purchase, and simultaneously sell the certificate to a third party, which would make immediate payment to the seller. If successful the plan would enable Microthermal to produce a letter from the seller confirming the sale to it, even though the sale would actually have been made to the third party. For such a plot expert timing, knowledge of the market, and acquaintanceship with the traders in it were essential. First Fischer called the Franklin National Bank on May 14, 1970, and under the name of Microthermal ordered a 90-day certificate of deposit (bearer form) for $500,000 to be delivered against payment at the Bank of New York. Meanwhile Fischer had convinced a friend and officer of the Neuwirth Fund, whose custodian bank was the Bank of New York, that he had a $500,000 certificate of deposit drawn on the Franklin National Bank for sale at a premium over the prevailing rate for such certificates. The officer of the Neuwirth Fund directed the Bank of New

York to purchase the certificate for the Fund's account. Pursuant to Fischer's instructions the Franklin National Bank issued the certificate of deposit and delivered it to the Bank of New York. Upon the Neuwirth Fund's instruction the Bank of New York paid for the certificate and entered it in the Fund's account.

The Franklin National Bank all the while assumed that it had issued the bearer certificate to Microthermal as the purchaser. Indeed, Frank S. Woodruff, an officer of that bank, had written to Kaplan to confirm the purchase of the certificate for Kaplan's account at the Bank of New York. By letter dated May 18, 1970, Kaplan instructed the Bank of New York to deliver the $500,000 certificate to Persky's office. Understandably, the receipt of this letter was marked by some confusion at the Bank of New York where the only certificate in that amount had been purchased for the Neuwirth Fund, not for Microthermal. Gilbert Losurdo, the officer at the Bank of New York handling this certificate, spoke by phone with a man who represented himself to be Robert Persky and who again asked that the certificate be delivered to him. (At this point Persky, like Kaplan before him, apparently believed that a fraudulent certificate had actually been issued in Microthermal's name.) After hearing of the telephone call Galanis instructed Persky that the certificate was not held for Microthermal and that he should make no further calls to the bank that might upset their scheme.

Zane and Silverman played no role in procuring the certificate and the false documentation. But at a meeting after the certificate switch, which was attended by all the principals, the accountants' problem was discussed. At length it was decided that Zane and Silverman would certify the existence of the certificate of deposit on the basis of a letter from the Franklin National Bank to the effect that a $500,000 certificate of deposit had been issued

to Microthermal. At the same time it was agreed that Zane and Silverman's fee for the audit, previously set at $6,000, would be increased by $5,000. The earlier letter sent by the Franklin National Bank to Kaplan was considered inadequate because it suggested that the certificate had been issued to Kaplan's personal account rather than to Microthermal. A new letter was sought. On June 10 the Franklin National Bank sent another letter which contained the same flawed language as the original. A second letter on June 10 corrected the problem by stating that the certificate had been issued for the account of Microthermal. On the basis of this second letter Zane and Silverman certified that a certificate of deposit had existed for Microthermal as of January 31, 1970. The Form 10K Annual Report filed with the SEC thus included the certified financial statements showing Microthermal's cash and cash items as $525,024 when in fact at least $500,000 of this cash did not exist in any form.

The serpentine course of the conspiracy was traced at trial largely through the testimony of Galanis and Yamada. The two stood accused of a series of other fraud and tax offenses and it can be supposed that it was more than a trace of self-interest that led them to cooperate with the government. The government also introduced testimony that Zane and Silverman's work papers were wholly inadequate to certify the existence of the certificate of deposit and the funds underlying that certificate. Zane and Silverman never attempted, for example, to verify whether Microthermal had an account at the Bank of New York or held a certificate there in its name. Their work papers did make an implausible attempt to cover the period from October 1969 through May 1970, when the Franklin National Bank certificate was supposed to have been issued to Microthermal, by showing several certificates of deposit as hav-

ing been issued in October and January with maturity dates on May 14, 1970. There is, however, no evidence of any of these earlier certificates; indeed, Microthermal's books reflect neither their issuance nor their rollover at maturity on May 14. Furthermore, Silverman and Zane show these certificates as earning 6.75% interest though a government witness testified that during the relevant period banks were prohibited from paying any more than 6.25% interest on such certificates. Against these proofs Persky, Zane and Silverman offered only the defense that they believed in the existence of the $500,000 certificate of deposit and in the truth of the second Franklin National letter issued on June 10, 1970.

After deliberating for almost two days the jury acquitted all the appellants on Count One, the conspiracy charge; appellants Zane and Silverman on Count Three, charging the obstruction of the SEC investigation; and appellant Zane on various counts charging him with perjury before the SEC. The next morning the judge delivered a modified Allen charge to the jury. After further deliberation the jury returned a guilty verdict against all the appellants on Count Two, the substantive count which charged that they actually filed the false report with the SEC.

Issues Raised by All Appellants

The first question to be considered is whether the jury's not-guilty verdict with respect to Count One (conspiracy to file the false Form 10K Annual Report) barred it from later entering a separate verdict of guilty with respect to Count Two (substantive offense of filing the false Form 10K Annual Report itself). The jury returned a partial verdict acquitting appellants on several counts, including Count One, and retired for the night without having rendered a verdict on Counts Two, Eight and Twelve. On

the following morning the jury, after receiving a modified Allen charge from the court, retired for further deliberations. Shortly it sent a note to the judge indicating that one juror felt that he could not change his vote on Count Two without changing his vote on Count One. At this point counsel for the appellants moved for a mistrial. The court denied the motion and instructed the jury that it was too late to change on Count One (as to which a verdict had been entered), that Counts One and Two were separate and distinct offenses and that the jury should consider Count Two. Zane and Silverman objected to this instruction. Indeed, immediately after the partial verdict of acquittal they had moved that the remaining counts be dismissed since there was no rational way—as far as they were concerned—that the jury could return any verdict but not guilty on the other counts. They argued that the two counts were virtually identical and that since the jury had found no agreement to file the false Annual Report as alleged in Count One it could not find that appellants aided and abetted the filing of the report as charged in Count Two. The jury, however, after further deliberation, returned a guilty verdict on the substantive offense.

In a supplemental brief received after the argument appellants urge that the verdict of not guilty on the conspiracy count must act as a bar to the later verdict of guilty on the substantive count. The government has replied that the problem is really just a variation on a familiar theme for which there is an authoritative and well-settled answer: that the courts will not speculate on inconsistent verdicts and that a jury's determination on one count in an indictment has no estoppel effect on its determination on other counts at the same trial. *Dunn* v. *United States*, 284 U.S. 390 (1932); *United States* v. *Carbone*, 378 F.2d 420 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967). However, appellants correctly point out that the

particular sequence in this case is novel. In the usual case the inconsistent verdicts are simultaneously returned; here the verdicts were separated by further deliberations. Appellants argue that this temporal factor distinguishes this case from the traditional rule and brings it closer to *Sealfon* v. *United States*, 332 U.S. 575 (1948), where the Court applied the principle of res judicata to bar a subsequent prosecution on a substantive offense after an acquittal on a related conspiracy count, than to *Dunn* v. *United States*, 284 U.S. 390 (1932), where the Court declined to upset inconsistent verdicts simultaneously rendered in the same trial. We think not.

It is well settled that even plainly inconsistent jury verdicts, simultaneously rendered are the jury's prerogative. The rule, as announced by Judge Learned Hand in *Steckler* v. *United States*, 7 F.2d 59 (2d Cir. 1925), and confirmed by Justice Holmes in *Dunn* v. *United States*, 284 U.S. 390 (1932), is that consistency in jury verdicts is not required. That the rule retains all its vitality today is evident from our steadfast adherence to it. See, e.g., *United States* v. *Handel*, 464 F.2d 679 (2d Cir.), *cert. denied*, 409 U.S. 984 (1972); *United States* v. *Catalano*, 439 F.2d 1100 (2d Cir.), *cert. denied*, 404 U.S. 825 (1971); *United States* v. *Carbone*, 378 F.2d 420 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967); *United States* v. *Magnus*, 365 F.2d 1007 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967).[3]

It is equally clear that the principle of res judicata recognized in *Sealfon* v. *United States* in the setting of *separate* prosecutions has no application to the inconsistent

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3 To be sure, this court has declined to extend to judges the same prerogative in returning inconsistent verdicts that juries have historically enjoyed. *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960). But at the same time this court has made it clear that nothing said in *Maybury* reflects upon the continuing force of the *Dunn* rule. *United States* v. *Carbone*, *supra*.

verdicts on counts tried together under a single indictment. *United States* v. *King*, 373 F.2d 813 (2d Cir.), *cert. denied*, 389 U.S. 881 (1967); *United States* v. *Marcone*, 275 F.2d 205 (2d Cir.), *cert. denied*, 362 U.S. 963 (1960).

Appellants argue that the rule, which recognizes that compromise or an indication of leniency may underlie apparently inconsistent verdicts, should not apply here because no such considerations could have played a part in the jury's verdicts in the present case, since it reached a final verdict as to Count One, which it rendered before its further deliberation and verdict as to Count Two. However, the rule against disturbing inconsistent verdicts runs deeper than the principle of compromise. The validity accorded to such verdicts recognizes the sanctity of the jury's deliberations and the strong policy against probing into its logic or reasoning, which would open the door to interminable speculation. It is still possible, for instance, that because of the multiple counts with which it was confronted the jury, recognizing that it might still find appellants guilty on Count Two, decided to forego a possible guilty verdict on Count One as a means of "using its power to prevent the punishment from getting too far out of line with the crime," *United States* v. *Maybury*, 274 F.2d 899, 902 (2d Cir. 1960), and that after a night's sleep the thought of possible inconsistency first occurred to one juror. To this we might add the further possibility that the jurors, because of the inherently prolix nature of instructions as to the law of conspiracy, which have become increasingly complicated and intricate over the years, may have misapprehended some aspect of that crime.[4] The burdens im-

4 With the aid of hindsight we think that Judge Wyatt would have been better advised, in response to the jury's note indicating one juror's doubt as to whether he could consistently render different verdicts on Counts One and Two, to have instructed the jury again as to the elements of the second count, since the jury's recollection of the charge, after two days' deliberations, may well have faded.

posed by the conspiracy charge have repeatedly been underscored by leading lights of the judiciary. *Krulewitch* v. *United States*, 336 U.S. 440, 445-58 (1949) (Jackson, *J.*, concurring); *United States* v. *Bufalino*, 285 F.2d 408, 417 (2d Cir. 1960) (Lumbard, *C.J.*); *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.) (L. Hand, *J.*), *aff'd.*, 311 U.S. 205 (1940); *United States* v. *Peoni*, 100 F.2d 401, 403 (2d Cir. 1938) (L. Hand, *J.*). Although further examples of conjecture as to the jury's mental gymnastics are possible, the danger inherent in such endless surmise, absent a set of specific and detailed findings of fact, is readily apparent. Faced with this prospect we have long since opted in favor of according controlling weight to the jury's prerogative.

In any event the return of a not-guilty verdict on a conspiracy count does not ipso facto constitute a bar to conviction on the underlying substantive offense even when there are separate prosecutions for the two offenses.[5] An acquittal on a conspiracy count would bar conviction on a substantive count only if it constituted a "determination favorable to the petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial." *Sealfon* v. *United States*, 332 U.S. 575, 579 (1948). Applying these standards, the inconsistency in the jury's verdicts in the present case is more apparent than real. A careful reading of the indictment and the charge to the jury indicates that the jury could have acquitted the appellants on the con-

5 The courts have applied the principles of res judicata in appropriate instances as when the verdict of acquittal in a conspiracy trial constituted a necessary "determination favorable to petitioner of the facts essential to conviction of the substantive offense." *Sealfon* v. *United States*, 332 U.S. 575, 578-79 (1948); *United States* v. *Kramer*, 289 F.2d 909 (1961).

spiracy charge as alleged and consistently have convicted them on the substantive count. The acquittal was not necessarily a finding that there was no conspiracy or joint criminal venture, but only that the government had failed to prove the specific conspiracy alleged in Count One. The indictment specifically alleged three overt acts in furtherance of the conspiracy. The district court, in a rather restrictive instruction to the jury, advised them that they must find one of these three acts in order to convict on the conspiracy charge. In view of this charge the jury, though convinced that a conspiracy existed, may have entertained a reasonable doubt that any of the three specified acts occurred as alleged. This finding would not have prevented it from concluding on the basis of the other evidence that the appellants had actually committed the substantive offense. Indeed, the jury was permitted to reject any version of the conspiracy and still find that the appellants as individuals had committed the substantive offense.[6] For instance it could have based its verdict on a finding that each of the appellants was aware of the false nature of the report and nonetheless lent his name to the filing. For the foregoing reasons we decline to overturn the jury's finding of guilt on Count Two.

Closely related to the claim of alleged inconsistency in the verdicts are several subsidiary points raised by appellants. They argue that the court's charge immediately before the jury retired to consider Count Two and its supplemental instruction given during the second deliberation were prejudicial. They maintain that the charge affirma-

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6 The statute under which the appellants were convicted reads in pertinent part: ". . . any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter . . . , which statement was false or misleading with respect to any material fact, shall upon conviction. . . ." 15 U.S.C. §78ff(a) (1970).

tively encouraged the jury to return an inconsistent verdict on Count Two. Our finding that the verdicts were not necessarily inconsistent disposes of this argument. We think it appropriate to add, however, that at trial counsel for Zane and Silverman remarked with reference to the judge's modified Allen charge that it was "the fairest" Allen charge that he had ever heard. Whatever the potential of the standard Allen charge for promoting conviction—and we have repeatedly affirmed the district court's use of the charge in appropriate circumstances, see *United States* v. *Tyers*, 487 F.2d 828 (2d Cir. 1973); *United States* v. *Jennings*, 471 F.2d 1310, 1313-14 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973)— it was surely absent from the modified charge given by the judge here.

Appellants contend that it was error for the court, after its receipt of a note from the jury indicating that one of the jurors apparently thought that the two counts charged the same offense, to instruct the jury that Counts One and Two charged separate and distinct offenses. It is hornbook law that conspiracy and its underlying substantive offense are separate and distinct and can be charged as such. *Callanan* v. *United States*, 364 U.S. 587 (1961); *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Appellants' real complaint is not as to what the court said, as much as it is to what the court failed to say. Appellants asked the court to rule that the hearsay evidence admitted on the conspiracy count should not be considered on the substantive count. Their theory is that the jury, having rejected the conspiracy count, should not be free, in their deliberations on the substantive count, to consider evidence admitted because of the conspiracy count. The argument fails in at least two respects.

First, the hearsay evidence was admissible from the very outset on both the conspiracy and the substantive counts. Once the court is satisfied by a fair preponderance of inde-

pendent evidence as to the existence of a joint criminal undertaking, ordinary agency principles permit hearsay statements of a colleague in furtherance of that enterprise to be admitted on a substantive count that is unaccompanied by any conspiracy count. See *United States* v. *Rinaldi*, 393 F.2d 97, 99 (2d Cir.), *cert. denied*, 393 U.S. 913 (1968); *United States* v. *Messina*, 388 F.2d 393, 395 (2d Cir.), *cert. denied*, 390 U.S. 1026 (1968); *United States* v. *Granello*, 365 F.2d 990, 995 (2d Cir. 1966), *cert. denied*, 386 U.S. 1019 (1967); *United States* v. *Annunziato*, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). This result is not changed by the inclusion of a conspiracy count or by the jury's acquittal on that conspiracy count. See *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973); *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945).

Second, the question of the admissibility of hearsay evidence on the substantive and the conspiracy counts was for the judge alone to decide. That determination of admissibility is not altered because the jury later decides to acquit on either of the counts. *United States* v. *Pugliese*, *supra*. Nothing said in *United States* v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970), is to the contrary. There the cause for concern arose from the fact that the hearsay evidence was not admissible on the remaining counts of perjury and obstruction of justice. No such situation exists here: the hearsay evidence was admissible against appellants on both counts.

The next point raised by all appellants concerns the district court's voir dire. They allege that the court did not go far enough in its attempt to ferret out latent biases among the jurors when it refused to pose several questions propounded by appellants with respect to possible investment losses attributable to fraud or manipulation. In considering the issue we are bound by the accepted principle

that the trial judge enjoys wide discretion in conducting the voir dire. See, e.g., *United States* v. *Dennis*, 183 F.2d 201, 226-28 (2d Cir. 1950), *aff'd.*, 341 U.S. 494 (1951). Here the district court more than met its responsibilities in this respect. Judge Wyatt acquainted the jury with the substance of each of the counts of the indictment, including the charge of filing of a false financial report on behalf of Microthermal with the SEC. He identified each appellant by name and profession and named the principal brokerage firms and companies that might figure in the case. Thus each juror should have been able to determine whether there was anything about the case generally that would make it difficult for that juror to serve impartially. The court's questions, of both a broad and narrow gauge, including whether the jurors had been the victims of a crime or involved in controversies with the SEC, were adequately calculated to plumb potential sources of prejudice. On the basis of the voir dire at least three prospective jurors asked to be excused, one because he had suffered losses at the hands of stock manipulators. The court's questions had obviously brought to the jurors' minds the same range of considerations as appellants sought through their proposed questions. Of course there is always the possibility that the consciences of other jurors might have been pricked and still further-flung potential sources of bias detected through an infinite regression of questioning or through the fortuitous wording of a particular question. But no system of justice can wait upon such adventitious occurrences. Wide discretion must be vested in the trial judge with respect to scope of the inquiry. Speculation will not suffice to overturn a voir dire when, as here, the court surveyed the likely sources of bias and prompted the jurors with evident success to consider for themselves what other sources of potential bias there might be. See *United States*

v. *Colabella*, 448 F.2d 1299, 1302-03 (2d Cir. 1971), *cert. denied*, 405 U.S. 929 (1972).

All the appellants object to the admission during the trial of the testimony of Lester Green, an SEC attorney who had worked on its Microthermal investigation. On cross-examination Persky, who testified in his own defense, was asked whether he had during an earlier interview with the SEC acknowledged that he had felt "uneasy" about the purported certificate of deposit in May and June of 1970. Persky denied having made such a statement. The government then called Lester Green, a participant in the SEC interview, to give contradictory testimony as to the statements made on this subject of uneasiness by Persky at the interview. Persky now maintains that this rebuttal testimony should not have been permitted because the meeting with the SEC was intended as a bargaining or settlement session.[7] Forewarned of the alleged purpose of the meeting, the trial judge had ruled that Green could testify only as to Persky's statements and not as to the nature or purpose of the meeting. Any potential for prejudice to Persky was thus eliminated by the court's ruling. Persky's further objection that by allowing Green to testify regarding his admissions made at an attempted "settlement" of the case against him the court somehow or other involved itself in a violation of the Code of Professional Responsibility, EC5-9, DR5-101, is not supported by the cited text of that Code or by opinions issued with respect to it. Indeed it would be a rather extraordinary interpretation that would enable a witness to testify to one version of the facts without risking confrontation with a prior contradictory statement, whether or not given to the prosecutor at an un-

7 The government disputes this characterization of the meeting, noting that it occurred before the indictment was filed and that Persky was advised of his *Miranda* rights at the beginning of the meeting.

successful plea bargaining session. There is no evidence that Persky's prior statement to the prosecutor was made "without prejudice" and it is doubtful, had such a condition been imposed, that the prosecutor would have continued with the session. In any event Green, although an SEC attorney, was not the prosecutor. Appellants' further contention that Green should not have been permitted to testify because he sat with government counsel throughout the trial is fully met by the settled rule permitting a government investigator, which was Green's function in this case, to do so. See *United States* v. *Infanzon*, 235 F.2d 318, 319 (2d Cir. 1956).

Zane and Silverman raise a more substantial objection to Green's testimony, based on their request for permission to cross-examine Green on the purpose of Persky's meeting with the SEC. The judge not only denied the request but denied Zane and Silverman any cross-examination of Green on the ground that Green's testimony was admitted against Persky only and not against them. Zane and Silverman argue that this ruling denied them their rights under *Bruton* v. *United States*, 391 U.S. 123 (1968). The *Bruton* point need not detain us. Persky himself testified and was subject to cross-examination by Zane and Silverman. The right of confrontation with the declarant was thus never in question. See *Nelson* v. *O'Neil*, 402 U.S. 622, 629-30 (1971).

Zane and Silverman further contend, however, that the ruling denied them their general right to cross-examine a witness. The court, concerned with the possibility that they might attempt to get into the purpose of the meeting with the prosecutor, which it had ruled "off limits," relied on its instruction to the jury that Green's testimony was to be considered against Persky only. If this ruling were crucial we might doubt its soundness as a general principle, since

the "rub-off" effect of testimony against a co-defendant may sometimes prejudice a defendant, despite an instruction that it is not to be considered against him, see *Krulewitch* v. *United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); *Blumenthal* v. *United States*, 332 U.S. 539, 559 (1947). Furthermore, we fail to detect any impropriety in permitting such cross-examination, subject to whatever limitations are demanded by basic rules of evidence. We need not cross that Rubicon in this case, since nothing in Persky's statements as recounted by Green could have prejudiced Zane and Silverman. Green's very brief testimony regarding Persky's statements to the government regarding the June 10, 1970, meeting attended by himself, Kaplan, Silverman, Zane and Galanis tracked what Persky had testified to at trial, except for the reference to his "uneasy" feeling, which of course incriminated Persky, not Zane or Silverman, and except for Green's failure to quote Persky as placing Zane at the June 10 meeting, which if anything was helpful to Zane. Silverman's contention that Green's account of Persky's earlier statement indicated that Silverman knew of the first June 10 letter from the Franklin National Bank[8] is not borne out by the record. Persky merely told Green that he had seen the first June 10 letter during a meeting on June 10 which Silverman also attended,[9] but Persky did not suggest that Silverman saw

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8 The first letter of June 10 suggested that a certificate of deposit had been issued to the personal account of Morton Kaplan. This was not considered adequate documentation upon which to certify the existence of a certificate of deposit in Microthermal's name. Hence the Franklin National Bank was asked to draft a second letter on June 10 showing the certificate as having been issued to Microthermal. Zane and Silverman denied having seen the first June 10 letter. The discrepancy between the two letters would normally have obligated them to do more checking than they actually did concerning the certificate.

9 Persky had himself on direct examination testified to the details of the June 10 meeting, including the facts that he saw the first letter at that meeting and that Silverman was present at the meeting.

the letter. Because we find nothing in the statements attributed by Green to Persky that the jury might—in disregard of the court's instruction—have applied against Zane and Silverman, we conclude that they were not prejudiced by their inability to cross-examine Lester Green.

Appellants' bevy of objections to various other evidentiary rulings made by the court in the exercise of its discretion are likewise found to be without merit. Persky contends, for example, that despite the fact that Galanis' testimony covers some 772 pages of the trial transcript, of which 518 pages were devoted to cross-examination, the court improperly restricted his cross-examination of Peter Galanis on the subject of criminal charges pending against Galanis in Canada which alleged that he defrauded others there. The subject of these criminal charges and of the understanding Galanis had with the government concerning his cooperation in this trial, which was relevant to the witness' possible bias in favor of the government, was adequately explored and developed. The court acted well within its discretion, having in mind the length of the trial and the subordinate nature of the inquiry, in denying Persky's request to embroider upon the topic by reading the Canadian charges to the jury. See, e.g., *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973); *United States* v. *Provoo*, 215 F.2d 531 (2d Cir. 1954).

Zane and Silverman mount a more sustained attack upon the court's rulings on cross-examination. They object first to the court's curtailment of their examination of Galanis after Galanis admitted to having deceived other accounting firms concerning the assets of Takara Partners. Galanis had testified specifically that he had deceived the accounting firm of Laventhol, Krekstan, Horwath & Horwath, which certified a financial statement falsely representing Takara's assets to be $3.2 million, by submitting false statements and documents to the firm and that he

had made substantial payments to the firm in the hope that the firm would take a liberal view of the audit of Takara Partners. The court acted well within its discretion in refusing to permit Zane and Silverman to pursue the point still further. They had sufficient testimony to argue to the jury, as they did in summation, that Galanis had simply deceived them in the same way he had deceived other accountants.

Zane and Silverman also assert that their cross-examination of Galanis was impaired by the court's refusal to treat statements made by Galanis to his probation officer as Jencks Act material (18 U.S.C. §3500). The defense sought to establish that Galanis' statements to his probation officer were inconsistent with the testimony he was offering at trial. Because the court deemed statements made to a probation officer to be privileged, it declined to order their release to the defense. However, we need not decide this point, for our own examination of Galanis' statements to his probation officer reveals that the statements are consistent with his testimony at trial and that they do not contain any exculpatory material.

Appellants Zane and Silverman further complain of a restriction that was placed upon their cross-examination of Yamada, whose testimony covers 416 pages of the trial transcript, of which almost 200 pages reflect cross-examination. The restriction related to testimony on Count Four, which had been severed from the present case at the request of Zane and Silverman. The count dealt with the purported transfer of the $500,000 certificate of deposit from Takara Partners to a third-party on November 20, 1970, three months after the main conspiracy had been consummated. In his testimony before the SEC Yamada had said that he believed in November 1970 that the certificate of deposit existed. Indeed, there was a letter of November 20, 1970, signed by Yamada in which he ac-

knowledged delivery of the certificate of deposit. At the present trial Yamada freely admitted that his testimony before the SEC was perjurious and that he knew that the certificate did not exist. Zane and Silverman attempted to persuade the jury to the contrary. They argued that Yamada was perjuring himself at trial and had been telling the truth about the certificate at the SEC hearing. To bolster this argument Zane and Silverman sought to introduce Yamada's letter of November 20, 1970. The government objected on the ground that the letter would bring the court into what was now a collateral matter, the transactions behind Count Four.

Had we been exercising a trial judge's discretion in the matter we probably would have admitted the letter as tangible impeaching evidence tending to support the argument that Yamada may have been testifying truthfully regarding the certificate before the SEC and lying at trial. On the other hand the letter was collateral in that expressions of Yamada's belief in November 1970, even if truthful—and of course Yamada contends that his SEC testimony was false—would not necessarily have served to impeach his trial testimony relating to his beliefs in May and June of 1970. More importantly, the government maintains—and Yamada would undoubtedly testify—that the November letter was itself part of a continuing sham. If, as appellants urge, Yamada in fact believed that the certificates existed in the Spring of 1970, his motive in denying such belief would be something of a mystery. Moreover, if evidence of the letter had been admitted at trial, the government would have sought to prove that the November transaction, which had been severed as a charge, was a sham, as were the statements in the November letter. Under the circumstances we are governed by the principle that limiting such potential excursions into collateral matters is something best left to the discretion of the trial

judge. See, e.g., *United States* v. *Kahn*, 472 F.2d 272, 279-80 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). Applying that principle here we cannot say that Judge Wyatt abused his discretion. In the five-week trial, marked by extensive cross-examination of Yamada, his credibility was thoroughly explored by counsel of recognized competence.

Issues Raised by Appellants Individually

Persky

Persky alleges that it was error to admit as evidence against him two phone conversations in mid-May with an officer of the Franklin National Bank (Frank Woodruff) and one such conversation thereafter with an officer of the Bank of New York (Gilbert Losurdo) to all of which, according to the testimony of the bank officers, a person representing himself to be Robert Persky was a party. As for the calls to the Franklin National Bank, Woodruff testified that after receiving a telephone inquiry in the first conversation (May 13) regarding the rate for a 90-day certificate of deposit, he received instructions in the second call (May 14) to deliver a 90-day $500,000 bearer certificate to the Bank of New York and to send a confirmation to Morton Kaplan, c/o Microthermal.

Persky maintains that there was no proof that it was he who actually made the calls and indeed argues that one of the alleged co-conspirators, Fischer, accounted for all the calls to the banks. Fischer, a severed co-defendant and alleged co-conspirator, testified that at the instance of Richard Kirschbaum, a friend of Yamada and Galanis, he made the calls to Woodruff, representing only that he was calling on behalf of Microthermal and providing basic information as to the order for the certificate, the name and address of Microthermal, Persky's name and his firm address and the name of Kaplan.

Appendix A

The court admitted the evidence of the calls on alternative theories: that the jury might on the basis of circumstantial evidence find that Persky had actually made the calls, or that the jury might find that the calls were made by some other co-conspirator. If the court, in light of Fischer's testimony, had admitted proof of the calls to Woodruff solely on the ground that those calls were made by a co-conspirator, there would have been no error. The calls were an integral part of the alleged conspiracy and as acts in furtherance of that conspiracy were admissible against Persky even if it was a co-conspirator who actually made them. *Pinkerton* v. *United States,* 328 U.S. 640, 646-47 (1946). Persky's objection, however, is to that part of the instruction that permitted the jury to find that Persky himself had made the calls.

Although there was some circumstantial evidence (e.g., Woodruff's contemporary notes containing Persky's phone number) from which the jury might have inferred that Persky made the calls to Woodruff, it was weak. The more likely possibility appears to be that Fischer made the calls and that he either represented himself to be Persky or, because he gave Persky's name and firm, led Woodruff to believe he was talking with Persky. Under the circumstances it was error for the court to have submitted the case to the jury on the alternative hypothesis that Persky may have made the two calls. However, we do not consider the error to be sufficiently serious to warrant a new trial. There was ample independent proof of a conspiracy to which Persky was a party. The evidence of the calls was clearly admissible on the theory that the call was made by a co-conspirator. The court specifically noted to the jury that the bank officers could not identify the caller's voice. Persky testified that he did not make the calls. The government did not contend to the jury in summation

that Persky had made the calls to Woodruff. In the face of very substantial proof of Persky's involvement in the alleged fraudulent scheme we believe that the submission of this admissible evidence on alternate theories could not have misled the jury.

Losurdo's testimony as to the purported Persky call to him stands on a different footing. There was ample circumstantial evidence that Persky did make the call to Gilbert Losurdo, in which the individual identifying himself as Persky demanded that Losurdo turn over to him a certificate of deposit belonging to Microthermal. The call had been preceded by a letter from Kaplan to the Bank of New York in which Kaplan directed that the certificate be sent to Persky. Mention was made of this letter during the telephone conversation with Losurdo. Kaplan had sent Persky a copy of this letter and so it was reasonable to infer that the caller was actually Persky. Moreover, Losurdo had written the telephone of Persky's firm below Persky's name on the letter received from Kaplan. Finally, Galanis testified that after he learned of the call to Losurdo, he contacted Persky and berated him for calling the bank. Persky was silent during this reprimand, thereby strengthening the impression that it was he who made the call.

Persky argues that all this circumstantial evidence is for naught, because the testimony of con-conspirator Fischer accounts for all the calls to Losurdo. Fischer did testify that he spoke with Losurdo on two occasions,[10] but the topic of these conversations according to Fischer was the earlier call to Losurdo from Persky. Obviously Fischer's testimony as to his calls with Losurdo does not account for the "Persky" call to Losurdo. Indeed, it seems most improbable

10 Losurdo testified that he could not recall any conversations with a Fischer.

that Fischer, who arranged the certificate ruse, would endanger the success of the operation by making such a call in a futile attempt to obtain the certificate itself. We conclude then that there was sufficient circumstantial evidence to permit the jury to find that Persky had made this phone call. *United States* v. *Fassoulis*, 445 F.2d 13, 17 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); *United States* v. *Lo Bue*, 180 F.Supp. 955, 956 (S.D.N.Y. 1960), *aff'd. sub nom. United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied sub nom. Guippone* v. *United States*, 372 U.S. 959 (1963). See *United States* v. *Bonanno*, 487 F.2d 654, 659 (2d Cir. 1973); *Van Riper* v. *United States*, 13 F.2d 961, 968 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926).

Appellant Persky also assails the court's ruling that limited to five the number of character witnesses he might call before the jury. This is a matter left to the court's discretion, which was not abused. See *United States* v. *Jacobs*, 451 F.2d 530 (5th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *Petersen* v. *United States*, 268 F.2d 87 (10th Cir. 1959). Nor can we say that the court erred in any respect by using the standard jury instruction on the subject of character testimony. See *United States* v. *Minieri*, 303 F.2d 550, 554-55 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962). See also *United States* v. *Cramer*, 447 F.2d 210, 219 (2d Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972).

Finally, Persky, in what appears to be a technical objection, argues that the court's use in its instruction to the jury of the phrase "certificate of deposit" when the Annual Report itself referred to "cash or cash items" was improper. Since the cash or cash items were certified by the accountants Zane and Silverman as being in the form of a certificate of deposit, the court naturally equated the two phrases for purposes of its instruction. Persky's conviction rests upon the jury's finding that he personally knew the accountants were certifying the existence of cash and

cash items on the basis of a nonexistent certificate. The court's instruction on the certificate and on the need for finding personal knowledge of the falsity of the Annual Report was appropriate and sufficient.

Zane and Silverman

Zane and Silverman argue that the trial court deprived them of their right to call Morton Kaplan, president of Microthermal, as a witness. This claim is based on certain statements made by the court when it sentenced Kaplan on the date when the government rested its case against appellants, after Kaplan had before trial pleaded guilty to the conspiracy count. Before sentencing Kaplan the court expressed its opinion that Kaplan's statements at the time of his plea, several of which Zane and Silverman claim tend to exonerate them, were false. Zane and Silverman, relying on *Webb* v. *Texas*, 409 U.S. 95 (1972), now argue that this judicial expression of disbelief was error because it dissuaded Kaplan from testifying at trial in their favor. We disagree.

Two days before the scheduled sentencing, the court specifically inquired of counsel whether Kaplan was going to testify for Zane and Silverman. The court had expressed a willingness to defer the sentencing if Kaplan was in fact going to testify. The response of counsel for Zane and Silverman indicated that they had no plans to call Kaplan as a witness. On the next trial day after the sentencing of Kaplan, however, they suddenly developed an interest in Kaplan as a witness. Apparently this change of heart coincided with their motion for a mistrial based on the court's comments to Kaplan at his sentencing, upon which they now sought to find a way of capitalizing. The court properly denied the motion after learning that counsel for Zane and Silverman had not even attempted to subpoena Kaplan

as a witness. In fact, Kaplan's attorney informed the court that Kaplan was still available to testify if called by any party. This communication belies appellants' claim that the judge's comments at sentencing somehow dissuaded Kaplan from testifying. In any event the appellants' failure to call or subpoena Kaplan as a witness disposes of any claim they might have, see *United States* v. *Sanchez*, 459 F.2d 100 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972); see also *United States* v. *Sclafani*, 487 F.2d 245 (2d Cir. 1973), this particularly so when appellants had led the court to believe shortly before sentencing that they had no interest in calling Kaplan.

The failure to call Kaplan as a witness though he was available likewise disposes of appellants' argument that they should have been permitted to introduce the transcript of Kaplan's statements at sentencing. There was no justification for introducing the transcript, even if it assumed not to fall within the proscriptions of the hearsay rule, for Kaplan was available to testify in person. See *United States* v. *Puco*, 476 F.2d 1099, 1106 (2d Cir. 1973); *United States* v. *Jones*, 400 F.2d 134 (9th Cir. 1968), *vacated on other grounds*, 395 U.S. 462 (1969). See also Rule 804 of the Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 438. Moreover, we find no basis under the declaration-against-penal-interest exception for admitting this hearsay evidence. The statements were not, as appellants would have us believe, against Kaplan's penal interests; on the contrary, if believed, the statements would tend to exculpate Kaplan (and by inference, Zane and Silverman). Finally, we find no error in the "missing witness" instruction given the jury with respect to Kaplan.

The only other point of any substance raised by Zane and Silverman relates to their request for a line-up or other

informal identification before Yamada was permitted to identify them in open court. The identification issue assumed some importance because Yamada was to testify that he had met Zane only once, at a conspiratorial meeting that Zane himself denied attending, and that he had met Silverman twice. Zane maintains that Yamada would have been unable to identify him but for an impermissibly suggestive in-court confrontation when for a moment Persky (whom Yamada had identified), Zane and Silverman were seated alone at the defendants' table. Thereafter Yamada pointed out Zane and Silverman, stating that he did not know which person was Zane and which was Silverman. Zane and Silverman had made their original requests for a line-up before Yamada came to the witness stand.

In appropriate cases the question of suggestive in-court identification might best be obviated at the outset by ordering a line-up—as the court surely has power to do. *United States* v. *Ravich*, 421 F.2d 1196, 1202-03 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). See *United States* v. *Soles*, 482 F.2d 105, 109 n.7 (2d Cir.), *cert. denied*, —— U.S. —— (1973); *United States* v. *Fernandez*, 456 F.2d 638, 641 n.1 (2d Cir. 1972). However, we do not find that the court's failure to order such a line-up here amounted to an abuse of discretion. The so-called "Rozzo" meeting in May or June 1970, testified to by Yamada as the occasion when he saw Zane and as one of the two occasions when he saw Silverman, lasted in excess of an hour. Silverman's own testimony also confirmed that he and Yamada had met once prior to the "Rozzo" meeting. Under these circumstances, while a hearing on the identification issue might, if requested (which it was not), have been advisable, see *United States* v. *Kaylor*, —— F.2d —— (2d Cir. Oct. 15, 1973), Slip Opin. 5471, 5458-59; *United States* v. *Mims*, 481 F.2d 636 (2d Cir. 1973), it appears most unlikely that the in-court

confrontation, even if labelled impermissibly suggestive, was the source of Yamada's identification. But even assuming it to have been capable of taint, the potential error was clearly harmless since Yamada's testimony as to the presence of Zane and Silverman at the "Rozzo" meeting was merely cumulative. Two other government witnesses, Galanis and Burns, whose identification of Zane and Silverman was unquestioned, placed the two accountants at the conspiratorial meetings. Yamada's identification of Zane and Silverman was in no sense central to this case. See *United States ex rel. Cummings* v. *Zelker*, 455 F.2d 714 (2d Cir.), *cert. denied*, 406 U.S. 927 (1972); *United States* v. *Abbate*, 451 F.2d 990 (2d Cir. 1971); *United States* v. *Baker*, 419 F.2d 83 (2d Cir. 1969), *cert. denied*, 397 U.S. 976 (1970).

We have examined all of the other points raised by the defendants on this appeal and find that none of them warrants discussion. The judgment of the district court is affirmed.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of May, one thousand nine hundred and seventy-four.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORTON S. KAPLAN, PHILIP ZANE, JEROME E. SILVERMAN, CHARLES J. FISHER, ROBERT S. PERSKY, RAMON N. D'ONOFRIO and U. S. SECRETARIAL INSTITUTE, LTD.,

Defendants,

JEROME E. SILVERMAN, PHILIP ZANE and ROBERT S. PERSKY,

Defendants-Appellants.

73-2401

Appendix B

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, Philip Zane and Jerome E. Silverman, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Irving R. Kaufman
Chief Judge

APPENDIX C

Statutory Provisions Involved

Title 15, United States Code, §78o

Over-the-counter markets; registration of brokers; information and reports

. . . (d) Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to August 20, 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security registered pursuant to section 78*l* of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 78*l* of this title. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than three hundred persons. For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which

are of substantially similar character and the holders of which enjoy substantially similiar rights and privileges. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof.

Title 15, United States Code, §78ff

Penalties

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every

day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78*o* of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact.

Title 18, United States Code, §2

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18, United States Code, §371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to de-

fraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 18, United States Code, §1505

Obstruction of proceedings before departments, agencies and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act or sec-

tion 1968 of this title willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18, United States Code, §1621

Perjury generally

Whoever having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more

than five years or both. This section is applicable whether the statement or subscription is made within or without the United States.

17 C.F.R. §240.15d-1

Requirement of annual reports.

Every registrant under the Securities Act of 1933 shall file an annual report, on the appropriate form authorized or prescribed therefor, for the fiscal year in which the registration statement under that Act became effective and for each fiscal year thereafter, unless the registrant is exempt from such filing by section 15(d) of the Securities Exchange Act of 1934. Annual reports shall be filed within the period specified in the appropriate report form. At the time of filing the annual report, the registrant shall pay to the Commission a fee of $250, no part of which shall be refunded.

17 C.F.R. §240.12b-20

Additional information.

In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.